Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

3303

February Term, A. D. 1954.

General No. 9926

Agenda No. 23.

WAYNE S. WILLIAMSON,
Plaintiff-Appellee
and Cross-Appellant,

vs.

McCANN & COMPANY, Inc.,
a Corporation,
Defendant-Appellant
and Cross-Appellee

Appeal from the
Circuit Court of
Moultrie County.

REYNOLDS, P. J.

The plaintiff, Wayne S. Williamson, was the owner of a certain farm in Moultrie County, on which there were gravel deposits. The defendant, McCann & Company, Inc., was a contracting firm, doing work on the roads in Moultrie County and using gravel in such work. In filling certain contracts for surfacing roads in the vicinity of the farm of the plaintiff, the defendant removed gravel from the farm of the plaintiff. In 1948 the defendant removed gravel from the farm of the plaintiff, paid for it and no question was raised by either party. At that time, the farm of the plaintiff, or rather the gravel pit, was under a gravel lease to one Clarence Spencer. Shortly before the defendant took any gravel in 1948, from the land of the plaintiff, one Henry Cummings succeeded Spencer as the gravel lessee. After removing the gravel, the defendant made out its check to plaintiff, mailed it to Henry Cummings and this check was divided between the plaintiff and Cummings. There is some dispute as to whether this was a division

of the check or a gift to Cummings by the plaintiff. The plaintiff claims it was a gift and Cummings claims it was an equal division. No question however, as to the payment by the defendants as to that gravel is made in this suit.

In 1951 the same Henry Cummings was still the gravel lessee of the farm of the plaintiff. The defendant company, dealing with Cummings, agreed upon a price of 40 cents per cubic yard for gravel to be removed by the defendant and did, under that agreement, remove 5,802.4 cubic yards of gravel from the farm of the plaintiff. There were two pits on the farm, designated in the pleadings and evidence as Pit No. 1 and Pit No. 2. The written agreement between Williamson and Cummings was for Pit No. 1. The gravel removed by the defendant in 1948 and 1951 was from Pit No. 2. There is evidence that the owner, Dr. Williamson, was on the ground and knew that the gravel was being taken from Pit No. 2, and that he raised no objection. On the basis of the agreed price between the defendant company and Cummings, the defendant paid by check, $2,000.00 and tendered a later check for $320.90, which would be full payment for 5,802.4 cubic yards of gravel at the agreed price of 40 cents per cubic yard. The check of $2,000.00 was made out to Cummings and upon receipt, Cummings notified the plaintiff he had the check. There was some conversation that it was a nice Christmas present and the plaintiff's reply that it was not a present to him but merely a business transaction. Cummings, at the time of the conversation with the plaintiff, did not have the check with him and told the plaintiff he would either cash the check and issue his check to the plaintiff for $1,000.00, one half of the amount of the check, or the plaintiff could have the check and give him (Cummings)

a check for $1,000.00. Then it is the testimony that the plaintiff said to Cummings: "Put it in the bank". Cummings did put the check in the bank and placed to the credit of the plaintiff, $1,000.00 and took the other $1,000.00 for his own. This transaction was in November 1951. About one week later, the plaintiff wrote a registered letter to the defendant company, protesting the removal of the gravel and negating any authority of Cummings to sell the gravel. Up to this point there is no evidence that the plaintiff, at any time, had protested, objected to, or in any way evidenced anything contrary to the apparent understanding and agreement between him and Cummings, that Cummings was the gravel lessee not only of Pit No. 1, but of the whole farm. In fact there is evidence that he at one time told Cummings that he would never run out of gravel, that "there was gravel all over that farm".

The original suit, brought in July 1952, against the defendant company, was a two count complaint, charging the defendant company with trespass. The amount sought per yard of gravel in the original suit, was fifty cents per cubic yard of gravel, and for damages. This was later amended to $1.00 per cubic yard. To this complaint the defendant filed an answer denying all material allegations of the complaint, and also filed three affirmative defenses, the substance of said special affirmative defenses being that the plaintiff had held out Cummings as one authorized to sell the gravel and that the plaintiff was estopped to deny the authority of Cummings. The court heard the evidence without a jury, and after hearing the evidence rendered an oral opinion, which was transcribed and is a part of the record, and in that opinion, held for the defendant company, on the evidence. The court however, in its

a check for [illegible]. There is no [illegible] from [illegible]
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opinion, stated that if the complaint was amended by adding a count of "implied contract", the plaintiff would be entitled to judgment. The plaintiff, thereafter, upon leave granted, filed the suggested amendment or Count III of the complaint and the court then entered judgment for the plaintiff for $2,200.00. From that judgment the defendant appeals to this court and the plaintiff has filed cross appeal, appealing from the judgment denying the claim of the plaintiff under Counts I and II of the complaint.

Any decision of this cause must revolve around the actions of the plaintiff in leasing the land on which the gravel was located in the first instance, his knowledge that the gravel was being removed, his actions in taking the money in payment of the first lot of gravel removed by the defendant company, and his actions upon the attempted payment for the second lot of gravel.

There does not seem to be much question that the plaintiff knew of the removal of the first lot of gravel. He knew it was being removed from Pit No. 2, which under the terms of his agreement with Cummings, was not covered. Yet he accepted the money paid by the defendant company, and either gave as a gift or divided the proceeds with Cummings, on a fifty-fifty basis. There does not seem to be any question that the plaintiff was on the ground at the start of the second removal of gravel, either immediately before or shortly after the start; that he saw the equipment of the defendant company there; that he talked with officers or agents of the defendant company, and voiced no objection; that there was some conversation about a drag line the plaintiff wanted to rent, but nothing to indicate to anyone that he was not willing for the contract to go through as agreed between Cummings and the defendant company.

The evidence further shows that when the $2,000.00 check was called to his attention, he instructed Cummings to put the whole check in the bank. At that time he did not voice or indicate in any way, any objection to the removal of the gravel upon the terms agreed upon between Cummings and the defendant company. These facts not being disputed, the only question that remains to be decided by this court is to determine what effect, if any, the facts had on the agreement between Cummings and the defendant company. If by such actions or lack of action or objections, the plaintiff held out Cummings as his agent or lessee, he would be estopped to come into court now and refute such agency or lease. If such actions or lack of objections constituted Cummings as his agent or lessee, then there could be no implied contract between the plaintiff and the defendant. A decision on this point will dispose of the appeal and the cross-appeal at the same time.

Defendant cites Northern Illinois Coal Corp. v. Cryder, 361 Ill. 274, 287. In that case, a Mrs. Cryder held herself out as the "managing heir" of the premises, and held herself out, with the knowledge and consent of the other owners, as their agent, with full power to attend to the business matters connected with said premises. The court there said: "Where the principal knowingly permits another to hold himself out as his agent and the agent in that capacity exercises authority, the principal is bound to the same extent by the authority assumed and exercised, with the apparent authority of the principal, as by the authority actually granted. And this may relate to a series of transactions as well as to a single transaction." In this case, in the matter of the first gravel removed by the defendant

company, the plaintiff permitted Cummings to sell from Pit No. 2, and the defendant company to remove and pay for gravel that was not covered by the written agreement between the plaintiff and Cummings. The plaintiff received a check in full for the amount of gravel removed, and either divided it with Cummings, or to use his own language, gave to Cummings one-half of the proceeds as a gift. Whether or not a gift, there was no notice to the defendant company that it was not justified in dealing with Cummings and that Cummings did not have authority to sell gravel from Pit No. 2. By his silence and acceptance of the money, the plaintiff permitted Cummings to hold himself out to the defendant company as the agent or lessee of the plaintiff, not only for Pit No. 1 but for Pit No. 2 as well. The actions of the plaintiff, when he went on the land and saw the defendant company either removing or getting ready to remove the second lot of gravel, further constitutes a holding out of Cummings as his lessee or agent. According to evidence which is not disputed, the plaintiff was there, saw the men of the defendant company working, and said nothing. Did the failure of the plaintiff, in the first instance, in permitting the sale of the first lot of gravel and receiving without objection the money therefor, and the failure to object when on the ground and seeing with his own eyes the removal or preparation for removal of the second lot of gravel by the defendant company, ratify the actions of Cummings in selling from a pit he did not have specific authority over? We think it did. Ratification need not be express. It may be shown and proved by circumstances, or by acquiescence. American Car and Foundry Co. v. The Industrial Commission, 335 Ill. 322. In that

case the court used this language: "'If one, not assuming to act for himself, does an act for or in the name of another upon an assumption of authority to act as an agent of the latter, even though without any precedent whatever, if the person in whose name the act was performed subsequently ratified or adopted what has been done, then the ratification relates back and supplies the original authority to do the act.' *** It is not necessary that a ratification be express. It may be proved by circumstances or be inferred from acquiescence after ratification."

In the case of Freeport Journal-Standard Pub. Co. v. Ziv Co., 345 Ill. App. 337, while this is the case of a corporation, does set forth the doctrine of estoppel applicable to this case, at page 349. There the court said: "'a corporation which, by its voluntary act, places an officer or agent in such a position or situation that persons of ordinary prudence, conversant with business usages and the nature of the particular business, are justified in assuming that he has authority to perform the act in question and deal with him upon that assumption is estopped as against such persons from denying the officer's or agent's authority.'" This rule is also set forth in the case of Lambert v. Dabbs, 302 Ill. App. 400. Where one stands by, as Dr. Williamson did in this case, and sees another about to take gravel from his gravel pit, and fails to assert his title or opposition to the taking, he will be estopped afterwards from asserting his rights. Moore v. Gilmer, 353 Ill. 420; Harmony Way Bridge Co. v. Leathers, 353 Ill. 378; Oliver v. Ross, 289 Ill. 624; Nelson v. Burns, 255 Ill. App. 314. While the facts in these last cited cases are not in point with the facts in this case, the law as enunciated is applicable.

The plaintiff in his brief, takes the position that a trespass on the part of the defendant company took place. But there is no evidence of such a trespass, and the trial court correctly held that there was no trespass. The defendant company was dealing with a person who had acted before as agent for the principal. The actions and conduct of the plaintiff led the defendant company to assume, on the basis of its previous dealings, that Cummings was still the gravel lessee and authorized to do business for the plaintiff, and the plaintiff did nothing to correct the error, if it was error. The plaintiff pleaded the Statute of Frauds but that is not applicable, since this was a completed transaction. The Statute of Frauds only applies to executory contracts. Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Wood, 189 Ill. 352. Here there was a completed contract. The defendant company had removed all the gravel it needed and was ready to pay. The Statute of Frauds can not be invoked.

In view of the facts in this cause, it is apparent that the plaintiff acquiesced in the agreement made by Cummings for the sale of gravel to the defendant company at 40 cents per cubic yard. The plaintiff had the opportunity in ample time to have prevented substantial injury to himself, by speaking up when he saw the crew of the defendant company and its machinery on his land, either taking or getting ready to take the gravel. He chose to remain silent. He cannot now, come into court and while accepting the benefits of such an agreement made with his acquiescence, renounce it and demand more. He is estopped to deny the authority of Cummings by his actions.

As to the implied contract, we think the decision of the trial

court, allowing the plaintiff to amend his complaint and plead an implied contract was in error. If there was no trespass, and the trial court so held, then the contracts made by Cummings, with the defendant company, which was by his actions or lack of denial, ratified by the plaintiff, govern and there can be no implied contract. The intent stated by the trial court was to allow the plaintiff to plead so as to conform the pleadings to the proofs. But there is no proof of any implied agreement between the parties, and if Henry Cummings was the lessee of the gravel pit, either expressly or by implication, then there can be no implied agreement between the plaintiff and the defendant company.

The judgment of the trial court finding for the defendant on Counts I and II of the amended complaint is affirmed. The judgment in favor of the plaintiff on Count III of the amended complaint is reversed and judgment entered here for defendant.

Affirmed in part, reversed in part and judgment entered here.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A. D. 1954.

General No. 9929. Agenda No. 26.

In the Matter of the Estate of Elizabeth Truitt, deceased.

# # #

STANLEY B. BALBACH, as Administrator of the Estate of Elizabeth Truitt, deceased,
Plaintiff-Appellee,

vs.

HENRY SHANNON et al.,
Defendants,

ROBERT TRUITT, BESSIE YOUNG, DAISY MILLER, OWEN TRUITT and ORVILLE TRUITT,
Defendants-Appellants.

Appeal from the County Court of Champaign County.

REYNOLDS, P. J.

This is an appeal from an order of the County Court of Champaign County to sell real estate to pay debts in the estate of Elizabeth Truitt, deceased.

Elizabeth Truitt died intestate, a resident of Champaign County, Illinois, on February 3, 1940, leaving surviving her Robert Truitt, her husband, and Bessie Young, Daisy Miller, Owen Truitt and Orville Truitt, her children, as her only heirs at law. During her lifetime Elizabeth Truitt was a recipient of Old Age Assistance from the State of Illinois through the Illinois Public Aid Commission and the sums so received by her as Old Age Assistance

were never repaid to the State of Illinois. At the time of her death, Elizabeth Truitt was seized in fee simple of the real estate involved in these proceedings. The real estate was, at the time of Elizabeth Truitt's death, occupied by her and her husband, Robert Truitt, as a homestead. After the death of Elizabeth Truitt, her husband, Robert Truitt, continued to occupy the real estate involved here as a homestead until November, 1950, when he was removed to a hospital, after which he no longer occupied the premises in question. In February, 1952, Robert Truitt notified the Illinois Public Aid Commission that he had conveyed his interest in the real estate and had no further intention of occupying it as a homestead. The Illinois Public Aid Commission then requested appellee, Stanley B. Balbach, as Public Administrator of Champaign County, to petition for letters of administration upon the estate of Elizabeth Truitt, deceased, and such petition was filed on February 15, 1952. Appellants filed their motion to dismiss the petition for letters, which motion was denied, and letters of administration were issued to appellee on March 19, 1952. The claim of the Illinois Public Aid Commission for the amount Elizabeth Truitt had received as Old Age Assistance was filed in the estate and was allowed. Appellee, as administrator, filed an inventory showing no personal property and a statement showing a deficiency of personal property to pay debts and costs of administration. Subsequently, appellee, as administrator, filed a petition to sell real estate to pay debts and appellants filed their motion to strike the petition to sell real estate, alleging that the petition was barred by Paragraph 379,

were never repaid to the estate of Illinois. [illegible]
death, Elizabeth Trotter was named in [illegible] of [illegible] estate
involved in [illegible]
Elizabeth Trotter's [illegible]
Trotter, [illegible]
[illegible]

Chapter 3, Illinois Revised Statutes, for the reason that the petition was filed more than seven (7) years after the death of the decedent and that the petitioner was guilty of laches. The motion to strike was denied and the petition was granted and an order to sell the real estate involved here to pay debts was entered on April 8, 1953.

Robert Truitt, Bessie Young, Daisy Miller, Owen Truitt and Orville Truitt bring this appeal.

Appellants contend:

(1) That the granting of letters of administration and the order to sell real estate was error because appellee was guilty of laches, and

(2) That the order to sell real estate to pay debts was entered contrary to the provisions of Paragraph 379, Chapter 3, Illinois Revised Statutes.

As to the contention that appellee is guilty of laches, the only ground advanced to support that contention is that appellee did not commence the proceedings complained of until twelve years after the death of Elizabeth Truitt. There is no showing that this lapse of time prejudiced appellants or that their position would have been different had the proceedings been commenced earlier. Mere passage of time does not constitute laches but it must also appear that the party claiming laches has been injured or prejudiced by the delay. Brandt v. Phipps, 398 Ill. 296. Rogers v. Barton, 386 Ill. 244. Section 5-4 of the Public Assistance Code (Paragraph 440-4 of Chapter 23, Illinois Revised Statutes) provides in pertinent part as

Chapter 2, Illinois Revised Statutes, for the [illegible] was filed more than seven (7) [illegible]
and then the petitioner [illegible]
was denied [illegible]
[illegible]

follows: "On the death of a person who has been a recipient the total amount paid under this article shall be filed and allowed as a claim against the estate of such person; provided, however, that no claim of the State shall be enforced against any real estate of a recipient while it is occupied as a homestead by his surviving spouse, *** if no claims by other creditors have been filed against the estate, or, if such claims have been filed, they remain dormant for failure of prosecution or failure of the claimant to compel administration of the estate for the purpose of payment. *** "

In view of this statutory prohibition against enforcement of the claim involved here during the time that Robert Truitt, as surviving spouse of Elizabeth Truitt, the decedent, occupied the premises as a homestead, it would seem that the delay complained of here does not constitute laches. Laches is not available as a defense against the sale of a decedent's real estate to pay debts where the delay is satisfactorily explained. Peters v. Peters, 342 Ill. App. 270. The statutory prohibition against enforcement of the claim of the Illinois Public Aid Commission during the period of the occupancy of these premises as a homestead by Robert Truitt, as surviving spouse of the decedent, is sufficient to satisfactorily explain the delay complained of here.

Appellants also contend that the order to sell real estate entered below violates the proviso of Paragraph 379, Chapter 3, Illinois Revised Statutes, which provides in pertinent part, " ***, provided, after the expiration of seven (7) years from the date of death of a decedent, or after the expiration of such additional time as may be

allowed by the Probate Court for good cause shown upon petition filed by any interested party within said seven (7) year period or any extension thereof, no real estate, or interest therein, to which the decedent had claim or title, shall be sold or mortgaged for the purpose of paying expenses of administration or claims against the estate. The seven (7) year period, with respect to decedents who shall have died prior to the effective date of this Act, shall be computed from the effective date of this Act. *** " This proviso was approved as an amendment to Paragraph 379, Chapter 3, Illinois Revised Statutes, on July 25, 1945. Appellants contend that the claim involved here is barred by these provisions since the petition to sell real estate to pay debts was not filed within the time limit prescribed.

Without passing upon the question whether this amended proviso to Paragraph 379, Chapter 3, Illinois Revised Statutes, takes effect as of July 25, 1945, the date of the amendment, or as of January 1, 1940, the effective date of the probate act of which it is a part, it seems apparent that this proviso is a statute of limitation. However, it also appears that Section 5-4 of the Public Assistance Code (Paragraph 440-4, Chapter 23, Illinois Revised Statutes) provides in part, " *** no claim of the state shall be enforced against any real estate of a recipient while it is occupied as a homestead by his surviving spouse, ***, if no claims by other creditors have been filed against the estate, ***" The undisputed facts here show that the property involved was occupied as a homestead by Robert Truitt from the date of Elizabeth Truitt's death on February 3, 1940, until November, 1950, and that the Illinois Public Aid Commission was not notified that Robert Truitt had conveyed his interest in the property and relinquished

his homestead rights until February, 1952. There is nothing to indicate that any other creditor sought payment of any claim against the estate during this time and it appears that the claim involved here could not have been enforced because of the statutory prohibition during the period of Robert Truitt's occupancy of the property as a homestead. It is fundamental that the time limited for the commencement of actions is stayed during the time such commencement is prohibited by statute. Paragraph 24, Chapter 83, Illinois Revised Statutes. Applying the general rule that limitations do not run while action is prohibited by statute, it is apparent that it makes no difference whether the amending proviso to Paragraph 379, Chapter 3, Illinois Revised Statutes, took effect as of the date of its approval, July 25, 1945, or as of January 1, 1940, the effective date of the probate act of which the proviso is a part. In either case, the petition for an order to sell real estate to pay debts complained of here was filed and the order entered within the seven (7) year limitation contained in the proviso to Paragraph 379, Chapter 3, Illinois Revised Statutes, as extended by the period of the statutory prohibition against enforcement of the claim on which the petition and order were based and therefore, the judgment of the court below was correct and should be affirmed.

Affirmed.

Mr. Justice Hibbs took no part in the consideration or decision of this case.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

3952 A

Abstract

February Term, A.D. 1954

General No. 9925 Agenda No. 22

Ernest B. Dabbs, Plaintiff-Appellee,	)	
vs.	)	Appeal from Circuit Court of Jersey County
Freda Dabbs, Defendant-Appellant.	)	

2 I.A. 43

CARROLL, J.

On December 17, 1952, the plaintiff, Ernest B. Dabbs, was granted a decree of divorce from his wife, Freda Dabbs.

From the statement of facts of the parties and on which they are in agreement, it appears that the complaint was filed March 12, 1952, and that thereafter numerous pleadings were filed. The record shows the filing on December 17, 1952, of a second amended complaint charging the defendant with extreme and repeated cruelty. On that date the defendant answered, the cause was heard and a decree entered.

In addition to ordering dissolution of the marriage contract, the decree fixed custody of the children of the parties and provided for payment of child support by the plaintiff. After reciting a finding that the parties had reached a complete agreement respecting their property rights, certain items of personal property were awarded to the defendant.

On December 15, 1952, the defendant, through counsel who did not represent her on the trial, filed a motion to vacate the decree. The grounds alleged therein are that a fraud was committed upon the court in that it was misled into believing the defendant to be guilty of extreme and repeated cruelty by false testimony of the plaintiff and his witnesses; that a fraud was committed upon the defendant in that the court did not consider the property settlement into which she had entered, in that plaintiff's witnesses were permitted to tell only half or partial truths and in that material relief for the petitioner is wanting in the decree; that a fraud was committed upon the witnesses, Harold and Virginia Dabbs, children of the parties, who testified for the plaintiff; and that a fraud has been committed in the cause by the entry of the decree which is wholly unconscionable in the adjusting of the property rights of the parties, fails to grant her alimony and does not compensate petitioner for losses sustained by her in the severance of the marriage relationship. The plaintiff answered the petition denying all charges of fraud. Upon a hearing the court denied the petition of defendant and this appeal followed.

The defendant here contends that the decree should be reversed for the reason that (1) plaintiff failed to prove his case as a matter of law and (2) that a fraud was perpetrated upon the court to induce it to enter the decree in question.

Determination as to whether there is merit in defendant's claim that the plaintiff failed to prove his case requires consideration of the evidence in the record. The plaintiff's evidence consists of his testimony and that of Virginia and Harold Dabbs, adult children of the parties. Without extensively detailing the same, this testimony was to the effect that defendant was addicted to fits

of anger towards the plaintiff; that on two specific occasions, while in a fit of anger, the defendant committed acts of physical violence upon the plaintiff; that these acts were accompanied by the use of profane and obscene language towards the plaintiff; that on other occasions the defendant had struck the plaintiff and that defendant's anger and attacks upon the plaintiff were unprovoked. No evidence was offered by the defendant.

Whether the evidence produced on the trial was sufficient to establish the charge of extreme and repeated cruelty as made against the defendant in the cause was a question of fact to be determined by the chancellor. Extreme and repeated cruelty is not susceptible of a rigid definition. It means acts of physical violence causing bodily harm but each case must be judged upon its own facts. Teal v. Teal, 324 Ill. 207; Ward v. Ward, 103 Ill. 477. As evidenced by the decree, the allegations of the complaint were found to have been proven. This court would not be warranted in disturbing such finding unless it can be said to be clearly and manifestly against the weight of the evidence. Lewis v. Lewis, 316 Ill. 447; McGaughey v. McGaughey, 410 Ill. 596; Guelzo v. Guelzo, 292 Ill. App. 151. The testimony of the plaintiff and his witnesses was not disputed or contradicted. If it is worthy of belief, then it must be said to constitute substantial evidence fairly supporting the decision reached by the trial court. The credibility of the witnesses and the weight of their testimony as proof of the facts sought to be established thereby were matters for the chancellor. Having the advantage of observing the witnesses as they testified, he was in a better position to judge these factors than is this court. Loucks v. Loucks, 345 Ill. App. 185. On this record there appears

to be no reason to doubt the sufficiency of plaintiff's evidence to sustain the decree.

There remains for consideration the defendant's theory that a fraud was perpetrated upon the trial court to induce it to enter the decree. This theory can only be sustained if the record contains clear and satisfactory proof of the perpetration of such fraud. The charges of fraud made in the defendant's petition to vacate the decree are in substance that the decree dissolving the marriage bonds and approving the property settlement between the parties rests upon false testimony given by plaintiff's witnesses. The petition fails to set up any other facts constituting the alleged fraud upon the court.

A decree will not be set aside merely because it was obtained by false evidence. Evans v. Woodsworth, 213 Ill. 404. It cannot be said that fraud is practiced upon a court where its findings and judgment rest upon legal and sufficient evidence, however false it may be. Bowman v. Wilson, 64 Ill. App. 73.

There is no suggestion in the defendant's petition that she was prevented from making a defense on the trial because of any fraud or misrepresentation practiced upon her. It is conceded by defendant that in the negotiating of the property settlement and on the hearing she was represented by able and experienced counsel. If the defendant was deceived by any unauthorized conduct of her counsel and thereby deprived of a fair judgment as to her rights, then the facts in regard thereto should have been made known to the trial court. There is no allegation in the petition that the defendant was in any manner deprived of her right to a fair hearing on the

to be no reason to doubt the sufficiency of the evidence to sustain the decree.

There remains [illegible]

that a fraud was perpetrated [illegible]

under the decree. [illegible]

nothing of [illegible]

fraud. [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

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[illegible]

issues in the case. For all that appears in this record, the defendant had her day in court.

The defendant's argument as to a court's duty to guard the sanctity of the marriage relationship and to prevent the obtaining of divorces by collusion is not applicable to the instant case. There is no evidence in the record tending to prove that the decree was entered by agreement of the parties. The mere fact that the parties made an agreement relative to their property rights raises no inference of collusion to procure a divorce. The defendant's petition to vacate said decree cannot be considered evidence of the facts stated therein. The same trial judge who entered the decree heard and denied defendant's petition to vacate the same. The record appearing to have afforded the trial court no reasonable basis for setting aside its decree, we must conclude that its ruling was not an abuse of discretion. Schneider v. Schneider, 249 Ill. App. 113.

Finding no error in the record warranting a reversal of the cause, the judgment of the Circuit Court of Jersey County is affirmed.

Affirmed.

Mr. Justice Hibbs took no part in the consideration or decision of this case

43 A

46135

BEULAH HILLS, Appellee,	)	
v.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
CHICAGO TRANSIT AUTHORITY, a municipal corporation, Appellant.	)	

2 I.A.3d 44

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment on a verdict for $3,000 in a personal injury suit. Plaintiff was injured while alighting from defendant's bus at the intersection of 39th street and Wentworth avenue, in the City of Chicago, on June 6, 1948. She was the only occurrence witness produced on her behalf. She testified, in substance, that as the bus was coming to a stop, she proceeded without difficulty to the front of the vehicle when a "jerk" occurred which threw her off balance; that she attempted to catch hold of a supporting rod or other device but was unable to do so and fell forward onto the street, seriously injuring her knee joint. Defendant produced two witnesses. One, John Unger, a baker, was the only eyewitness. He was standing at the corner of 39th street and Wentworth avenue, waiting for a bus. He testified that the bus came to a stop and four or five people alighted; that he saw plaintiff start to walk down the steps following the others and that she stumbled or tripped on the stairs; that as she was about to fall to the sidewalk, she grabbed hold of the rail and prevented herself from falling completely out of the bus; that he, to-

gether with another man, helped her and prevented her from falling completely. The driver of the bus stated that he was unaware of the accident until he heard plaintiff say, "I fell and broke my leg." He testified that about ten people got off the bus at the front door and that plaintiff was one of the last to alight. There is thus a complete disparity between plaintiff's testimony and the testimony of a disinterested witness. There is likewise a disparity in the testimony between the witnesses for defendant as to the number of passengers who were ahead of plaintiff. No complaint is made with respect to the rulings on the evidence or with respect to the instructions.

The principal ground urged for reversal is that the verdict is against the manifest weight of the evidence. It is argued that where a disinterested witness corroborates the testimony of a defendant as against the uncorroborated testimony of a plaintiff, the plaintiff has not sustained the burden of proof. Defendant relies upon the case of Peaslee v. Glass, 61 Ill. 94. There, plaintiff, a barber, sued for damages to his business caused by the defendant's turning off the water which serviced his shop. The plaintiff testified that the defendant admitted to him that he gave orders to the janitor to turn off the water. The defendant denied this and his testimony was corroborated by the janitor. The court held that in such a case, the plaintiff has not sustained the burden of proof. The distinction between that case and the instant case is obvious.

Following Peaslee v. Glass, supra, other cases have held to the same doctrine, but in all of them the verdict rested on the uncorroborated testimony of the plaintiff which was contradicted by that of the defendant whose testimony was corroborated by other witnesses. Mareno v. C.T.A., 342 Ill. App. 443, (and cases there cited). In the Mareno case, the defendant produced the testimony of three employees and one disinterested witness against the uncorroborated testimony of the plaintiff. The same thing is true of practically all the other cases cited in support of defendant's position.

There are many cases to the contrary, the strongest of which is Russell v. Richardson, 302 Ill. App. 589, 22 N.E. 2d. 185. In that case there were, in addition to the plaintiff, five occurrence witnesses, three of whom were passengers on a streetcar and entire strangers to the parties, all of whom testified that the plaintiff did not fall while alighting from the car, but that after she left the car she slipped and fell on the street. Notwithstanding this, the court held that the plaintiff had maintained her burden of proof. We do not go as far as that, but in this case it appears that plaintiff's testimony is contradicted by only one eyewitness to the accident. We cannot say that as a matter of law, plaintiff did not sustain the burden of proof when her testimony is weighed against the testimony of only one eyewitness and an inference from the testimony of another, who is an employee of defendant. The issue was properly submitted to the jury.

The next point urged for reversal is that the testimony of plaintiff does not prove negligence. Plaintiff testified that as the bus was getting ready to stop, she made her way to the platform and when she got there, the bus jerked and "I got unbalanced *** and I just kept coming out. *** The bus stopped with a jerk and I went out." Defendant argues that plaintiff was required to prove a violent, sudden or unusual jerk. It quotes authorities holding that a jerk or jolt must be unnecessary or unusually sudden or violent. Plaintiff testified that the jerk caused her to fall off the bus. In our opinion, this was sufficient for submission to the jury.

The last point made by defendant is that plaintiff failed to prove that she was in the exercise of due care. Before we can find plaintiff guilty of contributory negligence as a matter of law, we must consider the evidence in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 Ill. 188; Roadruck v. Schultz, 333 Ill. App. 476; Blair v. Blair, 341 Ill. App. 93. Plaintiff's conduct appears to us to have been that which normally prevails on defendant's busses. She walked to the exit as the bus was approaching her destination and when she reached it, the bus jerked. She attempted to take hold of a bar to steady herself, but was not able to grab it and thus fell. We see nothing in this which would warrant this court's holding that her conduct was negligence in law.

Judgment affirmed.

Tuohy and Robson, JJ., concur.

44 A

46316

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO MUNICIPAL COURT OF CHICAGO.
v.	)	
JOHN CHENNAULT, Plaintiff in Error.	)	

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

John Chennault, the plaintiff in error, was convicted in the Municipal Court of Chicago of violatingthe Uniform Narcotics Drug Act, Ill. Rev. Stat. 1945, chap. 38, par. 192-2, as amended, for unlawfully having in his possession heroin, a certain habit forming drug. He was sentenced to five years in the county jail and to pay a fine of $5,000. He appealed by writ of error to the Supreme Court and raised certain constitutional questions. Nevertheless, the appeal was transferred to this court, and we must assume that the case of People v. Hightower, 414 Ill. 537 (1953), settled all seriously debatable constitutional questions.

In People v. O'Connor, 350 Ill. App. 212, we found that the Municipal Court had jurisdiction of a prosecution instituted upon information of the Attorney General or State's Attorney or some other person. This disposes of plaintiff in error's contentions as to the jurisdiction of the Municipal Court.

Plaintiff in error contends that the language in the information, "Heroin, a derivative of opium, a

narcotic," is not a proper description in that heroin is a derivative of morphine and that in turn comes from opium. Chapter 38, paragraph 192-1 of the Uniform Narcotics Drug Act reads in part as follows:

> "The following words and phrases, as used in this Act, shall have the following meanings, unless the context otherwise requires:
>
> "* * *
>
> "(12) 'Opium' includes morphine, codeine, and heroin, and any compound, manufacture, salt, derivative, mixture, or preparation of opium, but does not include apomorphine or any of its salts."

An examination of this definition shows that the wording of the information follows the statute and therefore is sufficient.

The next point raised by the plaintiff in error is that the affirmation of the information is not sufficient. The information is signed by one Edgar Williams. The affidavit executed by him reads as follows:

> "State of Illinois,)
> County of Cook,) ss.
> City of Chicago.)
>
> Edgar Williams being first duly sworn, on his oath, deposes and says that he resides at 5th district, Chicago, Illinois, that he has read the foregoing information by him subscribed and that the same is true.
>
> Edgar Williams
>
> Subscribed and sworn to before me this 23rd day of July, A.D. 1951.
>
> Joseph L. Gill
> Clerk of the Municipal Court of Chicago."

We have examined this affidavit and find no substance to

the objections made, and plaintiff in error cites no authority for his objection.

The judgment of the Municipal Court of Chicago is affirmed.

Judgment affirmed.

Schwartz, P.J., concurs.

Tuohy, J., did not participate.

55 A

46127

FRANK MURPHY and ROSE MURPHY, Appellants,	APPEAL FROM
v.	SUPERIOR COURT
IRENE WARD, MICHAEL J. DENNEHY and AGNES DENNEHY, Appellees.	COOK COUNTY

2 I.A.2d 445

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs, husband and wife, appeal from an order dismissing count 2 of their complaint based upon liability under the Dram Shop Act in their action against defendant Irene Ward, as owner and proprietor of a tavern, and Michael J. Dennehy and Agnes Dennehy as owners of the premises in which the tavern was located.

The count alleges that on September 5, 1952 the defendant Irene Ward, as owner and proprietor of the tavern, in possession of the premises under a lease, did sell or give to herself intoxicating liquors or beverages, and did in whole or in part cause the intoxication of herself, and that while so intoxicated she shot the plaintiff Frank Murphy, severely injuring him and depriving the plaintiff Rose Murphy of her means of support for herself and her two minor children. The section of the Dram Shop Act relied upon by plaintiffs (Ill. Rev. Stat. 1951, chap. 43, par. 135) gives a right of action to every husband, wife, child, etc., who shall be injured, in person or property or means of support, by any intoxicated person, or in

consequence of the intoxication, habitual or otherwise, of any person, "against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person," and against the owners of the premises leasing or permitting the occupation of any building or premises and having knowledge that alcoholic liquors are to be sold therein. This statute is in substantially the same language as prior statutes and was intended, as the first section of the statute recites, to protect the health, safety and welfare of the people and foster and promote temperance in the consumption of alcoholic liquors "by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors." The sale or gift of intoxicating liquor, as of any other property, involves a transfer of title and possession. There cannot be such transfer of title or possession where the owner of the tavern consumes her own liquor, as charged in the complaint. The question presented on this appeal was decided adversely to plaintiffs in Gunderson v. First Nat. Bank of Chicago, 296 Ill. App. 111, where plaintiff was injured by the intoxicated owner of a tavern. At the close of plaintiff's evidence the court directed a verdict for defendant, but subsequently allowed a motion for a new trial. In reversing the order granting a new trial and remanding the case the court said (p. 116):

> "*** in order to hold the defendant owner liable plaintiff must first show that Monaco, the operator of the tavern, is liable under the Dramshop Act by reason of his having sold or given away alcoholic liquor to some person who became intoxicated and assaulted and injured plaintiff. In our opinion when Monaco helped himself to his own liquor he was neither selling nor giving away alcoholic liquor to the person who assaulted plaintiff within the contemplation of the statute. It is clear that Monaco could make neither a sale nor a gift of the liquor to himself and since there was no evidence of a sale or gift of liquor by the tavern operator as is required under the Dramshop Act in order to hold liable the owner of the premises in which the tavern was located the verdict was properly directed for defendant."

The order appealed from is affirmed.

AFFIRMED.

BURKE and FRIEND, J.J., Concur.

56 A

46155

ELEANOR GETZENDANER, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT
MRS. CHARLES ERBSTEIN, Appellant.	)	COOK COUNTY.

2 I.A.2d 405

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $6500 entered in plaintiff's suit for damages resulting from defendant's refusal to permit the removal of certain temporary improvements installed under a lease from defendant to plaintiff.

On November 9, 1945 defendant leased to plaintiff and Tudor C. Roberts twenty acres of land with a cottage and a stable for the housing of horses for the period from January 1, 1946 to December 31, 1948 for the monthly rental of $150. By the lease it was provided that the lessees "are to erect a building to be attached to the North side of the present building (stables), but in so doing they are not to break any of the present walls, and at the expiration of this lease, they shall have the privilege of removing said buildings and must leave the present building in good condition." It is further claimed by plaintiff that it was thereafter orally agreed between the parties that the lessees might erect a wire fence on the premises with a like privilege of removal on termination of the lease. The lessees failed to pay rent as provided in the lease and on May 22, 1947 defendant served a five days' notice demanding payment of

rent for March, April and May 1947, aggregating $450. No part of the rent having been paid a forcible entry and detainer suit was instituted, resulting in a judgment for possession in favor of defendant herein on June 10, 1947, a stay of the writ of restitution at the request of plaintiff herein until June 26, 1947, an execution of the writ on July 5th by removal of the personal property belonging to plaintiff herein, and a refusal to permit her to remove the above mentioned addition to the barn and fence which had been constructed by her. Shortly thereafter plaintiff instituted suit for damages because of such refusal. The complaint was stricken. On appeal the order was reversed (341 Ill. App. 594) and the cause remanded. Defendant filed an answer and a counterclaim. Certain portions of the answer, and the original counterclaim and second amended counterclaim were stricken. The parties went to trial on the amended complaint and the amended answer thereto. The jury returned a verdict for plaintiff with damages assessed at $6500, and judgment was entered on the verdict.

On the trial plaintiff admitted her indebtedness to defendant in the sum of $450 for rent at the time the forcible entry and detainer suit was instituted and the writ of restitution executed. She claims that after the service of the five days' notice and up to within a week of the execution of the writ of restitution she had talked with defendant and advised her that she was negotiating with several men--Campbell, Barnes, Gromer and Mansfield--in reference to subletting the premises;

that defendant said it would be agreeable to her if the parties were suitable; for this reason she did not make any effort to remove her property, including the lean-to addition to the stables and the fence; that when the writ of restitution was being executed she started to take down some of the movable stalls, to unloose the wire fence and to take other steps for removal of this property, and that she was stopped from doing so by the attorney and agent of defendant. Defendant was not present at the trial and the testimony of plaintiff relating to her transactions with defendant in respect to subletting the premises is uncontradicted. There is a direct conflict in the testimony of plaintiff and that of defendant's attorney as to what occurred on July 5th when the writ of restitution was executed. The credibility of the witnesses was a matter to be determined by the jury. We cannot say that the verdict is contrary to the weight of the evidence. If, as plaintiff contends, defendant gave permission to sublet the premises or was acquiescing in plaintiff's efforts to that end, plaintiff should have been afforded an opportunity to remove her property when defendant withdrew her permission and acquiescence by executing the writ of restitution. The evidence shows that the lean-to was attached to the stable by long bolts and could be removed within two or three days without any damage to the stables. The wire netting on the fence was likewise easily removable.

There was no error in the admission or refusal of evidence or in the giving or refusing of instructions. Defendant claims that the argument of plaintiff's counsel

was grossly prejudicial. The record shows that defendant's counsel made a number of objections to the argument, all of which were sustained. No further action was requested of the court and no error committed in respect to the argument of plaintiff's counsel. The judgment therefore must be sustained. However, for reasons hereinafter stated, execution on the judgment will be stayed until the final determination of defendant's rights under her counterclaim.

The evidence shows that plaintiff is a person of little or no financial responsibility. She admitted owing $450 in rent at the time she was ousted from possession, and thereafter judgment was entered by consent of her counsel in the Circuit Court of Cook County for $400, unpaid rent. She also testified that in constructing the lean-to she bought lumber from the Barker Lumber Company for which she owed $818, and that no part of that indebtedness had been paid. By defendant's second amended counterclaim she set up in the first paragraph her claim against plaintiff for $400, the amount of the above mentioned judgment. In paragraphs 2 and 3 she sets up an indebtedness from plaintiff to the Barker Lumber Company of $841 and the institution of suit by the lumber company against plaintiff and defendant herein for said sum and the establishment of a lien upon the property of defendant for that amount; that in order to avoid the imposition of the lien defendant had paid the Barker Lumber Company and taken an assignment of its claim. By paragraph 4 defendant seeks damages for waste committed by plaintiff while in possession

of the leased premises. Plaintiff's motion to strike is limited to paragraphs 2, 3 and 4 of the counterclaim and makes no reference to paragraph one, relating to the judgment for rent. The order of the court striking the amended counterclaim is as follows: "On motion of attorney for plaintiff to strike the second amended counterclaim, it is hereby ordered that the second amended counterclaim be and the same is hereby stricken, and it is further ordered that the defendant have leave to file within 30 days a third amended counterclaim." This order is erroneous in striking the entire counterclaim, the grounds specified by plaintiff in her motion to strike being limited to paragraphs 2, 3 and 4. The order is reversed.

Plaintiff, however, contends that defendant is in no position to urge on appeal any error in striking the amended counterclaim (1st) because error in this respect was not specified in defendant's motion for a new trial; (2nd) because, leave having been obtained to plead over, the error, if any, was waived. Plaintiff is in error in her position that rulings of the court in respect to pleadings prior to the trial of a case must be preserved in the motion for a new trial. A motion for a new trial can be granted only upon alleged errors occurring during the course of the trial, and not upon alleged errors regarding motions upon the pleadings or other matters arising before the trial is entered upon. Cella v. C. & W. I. R. R. Co., 217 Ill. 326; Scott v. Freeport Motor Casualty Co., 310 Ill. App. 421.

It must be noted that the order hereinabove quoted, granting leave to defendant to file a third amended counterclaim, was not made upon defendant's motion but upon motion of plaintiff's counsel. Defendant did not file a third amended counterclaim, made no effort to do so, and, so far as the record shows, did not in any manner whatsoever acquiesce in or ratify that portion of the order entered on plaintiff's motion. In Bennett v. Union Central Life Ins. Co., 203 Ill. 439, in which it was held that it is not requisite that a party whose pleading has been held defective on demurrer should orally or in writing advise the court that he abides his pleading or elects to stand thereon, the court said: "If he takes no steps from which a waiver or abandonment of his pleading is to be presumed, he has abided or 'stood by' his pleading, and may be heard to urge in a court of review that his plea was good in law and that it was error to hold it insufficient on demurrer." If as defendant alleges, she has paid the indebtedness of plaintiff to the Barker Lumber Company and has an assignment of that claim, which plaintiff admits is still due and owing by her, defendant should be given further opportunity to properly plead this claim, complying with section 22 of the Civil Practice Act in so far as she relies on the assignment, and further, to obtain credit on plaintiff's judgment for the amount of the judgment and costs in the suit for rent mentioned in the counterclaim.

For the reasons hereinbefore stated, execution on the judgment in favor of the plaintiff will be stayed

[Civil Practice Act, sec. 50 (3)] until the final determination of defendant's rights by way of counterclaim, as to which, from plaintiff's admission herein, there seems to be little doubt.

The order striking the amended counterclaim is reversed, the judgment appealed from is affirmed and the cause remanded with directions to stay the execution thereon until final disposition of defendant's counterclaim, and for further proceedings in conformity with this opinion.

AFFIRMED IN PART, REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

BURKE AND FRIEND, JJ., concur.

59 A

46162

WALTER W. VIRGIL, Appellee, v. NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, a corporation, Appellant.	APPEAL FROM SUPERIOR COURT COOK COUNTY

12 I.A.2d 46

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $39,000 entered in a personal injury action by plaintiff, a switchman in defendant's yards at La Fayette, Indiana, under the Federal Employers' Liability Act and Safety Appliance Act for injuries sustained June 11, 1948 when he attempted to set the air brakes on the private car of the division superintendent (hereinafter called car 6) by opening an angle cock or valve which worked hard and required greater force than usual. The case has been tried three times. The first trial ended in a disagreement of the jury and on the second trial judgment for $40,000 was entered against defendant. That judgment was reversed and the cause remanded by this court (347 Ill. App. 281) because of an erroneous instruction given on behalf of plaintiff and an erroneous ruling excluding defendant's evidence as to the condition of the angle cock after June 30, 1948.

We refer to our former opinion for a full statement of the allegations of the complaint, the working of the air brake system, the movements of car 6 in the La Fayette yard from its arrival June 8th to June 11, 1948 when plaintiff was injured, and the circumstances

of plaintiff's accident as detailed by him. We will repeat only such portions of that statement as is necessary for this opinion. Notwithstanding repeated references by counsel for both parties to the record on the first appeal, that record is not before us except in so far as the testimony on the second trial was introduced on the third trial for impeaching purposes.

At the close of all the evidence on the third trial plaintiff dismissed all charges under the Safety Appliance Act. The case went to the jury and is now before us on the charges of negligence under the Federal Employers' Liability Act. The only allegations of the complaint now material are that the angle cock was worn, dirty, out of alignment and worked very hard--plaintiff having to use extraordinary force in order to get it to move, and that defendant was careless and negligent in that it failed to make reasonable inspection of and to repair the brakes, air hose and other parts and appurtenances.

Plaintiff testified that he and his switching crew brought car 6 into the La Fayette yards June 8th and placed it opposite the station for the convenience of the superintendent; that each day they went to the car to put air in it. This required opening and closing the angle cock in question. On the morning of June 11th they moved the car from near the station to track 16 preparatory to putting it on the rear of an east bound passenger train.

The engine was uncoupled from the east end of the car and pulled away in a switching movement to get around car 6 and couple with the west end. Plaintiff remained with the car and in order to hold it in position started to open the angle cock. It would notopen. He jerked real hard. It opened all the way, causing the air hose and angle cock to whip or spin around and strike him on the wrist. He jumped back and fell over the rail on his back. From the day they got the car, on the 8th, to the time of his injury he had worked the angle cock about ten times, and each time it worked hard. The day before his accident he examined it and found that the handle was bent to the right one-eighth or one-quarter inch and the stem or key was hammered down about one-quarter of an inch below the top of the collar surrounding it. It is not necessary to jerk an angle cock in good working condition. You should be able to take hold of it with one hand, just pull it slow and easy and stop it anywhere you want it. On the afternoon of June 10th he told Perry, the car inspector who would have had to change the angle cock, "That damned angle cock works real hard, Charlie," and Perry motioned his hand and said O. K. The only corroboration of this testimony, if any, is the testimony of Horton, called by plaintiff as an air brake expert. He had been an air brake inspector for the Pennsylvania from 10 to 12 years before retiring to a farm in 1937, eleven years before plaintiff's injury. Because of developments on cross-examination,

including the fact that he had never seen the inside of an angle cock, the trial court rightly held that he was not an expert and struck most of his testimony. Plaintiff does not complain of this ruling. Horton's testimony that he had seen angle cocks of the type involved herein hammered on the stem so that the collar was one-quarter of an inch higher than the stem, and how such angle cocks worked, was allowed to stand. In response to questions by plaintiff's counsel he stated that he had worked such angle cocks; they were hard to open and hard to close; that "sometimes it worked so hard that you would use a hammer on it." He is the only witness to testify that he had seen men use a hammer on an angle cock. He also said that a workman who hammered a key down a quarter of an inch from the top of the collar of a handle would not be doing what he was supposed to do.

Five employees of defendant testified that in the regular course of their employment they worked the angle cock involved herein during the time car 6 was in the La Fayette yards, from June 8th to June 11th, after plaintiff's injury, and that it worked normally. Eight other employees testified that they inspected the angle cock at various times from June 8th to October 5, 1948, when defendant claims the angle cock and hose were removed because of plaintiff's suit, and that it worked normally. None of these witnesses noticed that the key had been hammered down into the collar, and none noticed that the handle had been bent, as testified to by plaintiff.

The Federal Employers' Liability Act (45 U. S. C., chap. 2, secs. 51-59) provides that every common carrier by railroad, when engaged in interstate commerce, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, *** or other equipment." The question in the trial court and before us on appeal is, as stated by plaintiff, "whether or not at the time of his injury the angle cock was in such a condition, due to the negligence of the defendant, that the plaintiff had to jerk with unusual force upon the handle in order to turn it, thereby causing his injury."

In justifying the verdict for plaintiff his counsel say that the jury could have found (1) that the angle cock failed to function properly when used by plaintiff because the handle was twisted; (2) from the mechanical construction of the angle cock and their own common observation and experience in life, that hammering upon a device which contains movable parts bearing upon one another in rather close tolerance, would have caused a sufficient malalignment as to make the device bind without necessarily causing so great an air leak as to stop the train or to fail to function at all; (3) that neither

the twisted handle nor the hammering had caused the angle cock to work hard, and that the reason it worked hard was for some cause unknown or unestablished. There is nothing in the record to justify the first possible finding of the jury suggested by plaintiff. There is no evidence that the handle was twisted. Plaintiff testified that it was bent to the right at the bottom, one-eighth to one-quarter of an inch. The angle cock introduced in evidence by defendant (which is admitted to be an angle cock of the type used on car 6 but not the actual angle cock used on the car) is before us. The handle extends out from and in the same plane as the collar about one inch. It then bends at a right angle so that it is close to and parallel with the hose when locked in an open or closed position. It is about 5 inches from the bend to the end of the handle. There is nothing in the evidence or in the mechanism of the angle cock indicating how the insignificant bend testified to could interfere in the slightest with its normal working. The second suggested finding hardly deserves serious consideration. The effect of hammering upon a device like the angle cock before us, and whether the malalignment caused by hammering would necessarily cause so great a leak as to stop the train or fail to function at all, is not a matter of common knowledge or observation but of expert testimony. Plaintiff attempted to supply this testimony but failed because of the incompetency of Horton. It is extremely

unlikely that any of the jurors had ever examined an angle cock. Plaintiff's right to damages, if any, must be based on a finding like the third suggested finding—that the angle cock worked harder than an angle cock in good working order, for some cause unknown and unestablished, and a further finding of negligence of the defendant. If, in fact, a normal angle cock works smoothly and easily and the angle cock in question did not work in that manner but required a strong jerk to open and close it, plaintiff was not required to prove the cause of this abnormality in its working. There would be a fair inference that the angle cock was defective. The facts in this case must be distinguished from those in Huff v. I. C. R. R. Co., 362 Ill. 95, on which defendant strongly relies. In that case there was no evidence of the failure of the jack which plaintiff was using to function properly before plaintiff was injured. In the present case we have plaintiff's testimony that at all times the car was in the La Fayette yards the angle cock worked hard, requiring a jerk to move it.

In recognition of his duty to prove negligence of the defendant in failing to repair or replace the angle cock within a reasonable time after notice of the defect, plaintiff testified, as hereinbefore stated, that he told Perry, the car inspector, that "that damned angle cock works real hard." Defendant contends that there is nothing in the testimony to show that plaintiff had reference

to the angle cock on car 6, or that Perry understood he was referring to car 6, and further, that notice of the fact that the angle cock "works real hard" is not notice of a defect requiring repair or replacement. Plaintiff was obviously referring to the angle cock on car 6 because his answer was in response to a question as to that angle cock. Defendant's counsel knew that plaintiff referred to car 6 because in cross-examination, in referring to plaintiff's notice to Perry, he asks, "And you said that the angle cock on No. 6 worked hard." And further, in attempting to impeach plaintiff counsel read certain questions and answers asked and given on a prior deposition in which plaintiff was asked specifically about his remark to Perry as to the condition of the angle cock on car No. 6. And finally, if we take the testimony of plaintiff as true, as we must, Perry understood what angle cock plaintiff was referring to because plaintiff says that when he hollered at Perry the latter said O. K. and waved his hand. Considering the O. K. most strongly in favor of plaintiff, it must be taken as an expression of understanding of plaintiff's complaint and the angle cock to which it referred. In the light of plaintiff's testimony that an angle cock normally works smoothly and easily, a complaint that it "works real hard" would be notice of a defective angle cock to an experienced car inspector.

As said in Williams v. N. Y. C. R. R. Co., 402 Ill. 494, "In actions under the Federal Employers' Liability Act the rule for measuring the sufficiency and amount of

evidence necessary to justify the submission of the case to the jury is that established by the Supreme Court of the United States." That rule is no different from the rule governing other cases (Hall v.&C. N. W. Ry. Co., Nos. 46184, 46201, opinion filed concurrently with this opinion), and is not different from the rule prevailing in this state, namely, if there is any evidence in the record which, standing alone or taken with its intendments most favorable to plaintiff, tends to prove the material allegations of the complaint, the motion should be denied. City of Monticello v. LeCrone, 414 Ill. 550. Plaintiff's evidence tended to prove that the angle cock was defective and that notice of the defect was given to the defendant. Whether defendant failed to repair or replace the angle cock within a reasonable time was a question for the jury, together with the questions whether on the whole evidence before the jury plaintiff had established by the preponderance of the evidence that the angle cock was in fact defective, and that he had given notice to Perry. The court did not err in refusing to direct a verdict for defendant.

To counteract or overcome the testimony of Horton that he had seen angle cocks in which the key or stem had been hammered one-quarter of an inch below the collar of the handle and that they worked hard, which the court permitted to stand, defendant offered the testimony of Blaine, a graduate engineer in the employ of Westinghouse,

the maker of the angle cock in question. He was permitted to testify that he had hammered the key or top of a similar angle cock and that it was easier to turn after it had been struck. Immediately thereafter the court struck the testimony without stating a reason for so doing. Plaintiff supports the action of the trial judge by claiming that the conditions under which Blaine made his tests are not shown to be the same as those under which that on car 6 had been hammered down. That contention, if tenable, should have excluded the testimony of Horton. All that was before the court in respect to the angle cock on car 6 or the hammered angle cocks which Horton had seen was that the angle cocks had been hammered. How and under what circumstances were not shown. Defendant was not obliged to show more, and the court erred in striking this testimony and in refusing to admit the testimony of Koszczymski, the car repair work inspector who had made somewhat similar experiments and obtained a like result. On the trial plaintiff contended most strongly that hammering of the angle cock tightened it and made it work harder, although he seems to have abandoned that position on appeal. It is very likely that the case turned on that question. The stricken testimony of Blaine and the proffered testimony of Koszczymski went to the heart of the case and its exclusion was extremely prejudicial.

Defendant complains of plaintiff's given instruction No. 1. In that instruction the word "inefficiency" was substituted for "insufficiency" in quoting that portion of the Federal Employers' Liability Act making the railroad liable for injury resulting in whole or in part by reason of "any defect or insufficiency" due to its negligence in its cars, engines, appliances, etc. This substitution is the only complaint against the instruction. It was undoubtedly inadvertent and was overlooked by the court and counsel for both parties. The words "inefficiency" and "insufficiency" are not interchangeable. They are synonyms when used in the sense of inadequate. It is doubtful that the jury was misled by the mistake.

Defendant also complains of the refusal of the court to submit its special interrogatory No. 1, and to give its offered instructions 4, 5 and 7. The interrogatory reads: "Was the angle cock which the plaintiff was using at the time of the occurrence on June 11, 1948, defective?" Plaintiff's counsel offered to withdraw its objection to the interrogatory if the word "inefficient" was added. Defendant refused to accept the addition and the court refused to submit the interrogatory. As contended by defendant, the words "defect" and "insufficiency" are used in the statute to denote two distinct ways in which the carrier becomes liable to its employees--by negligently furnishing a defective tool or appliance, or by furnishing

a tool or appliance possessing no defects but inadequate for the particular use to which it is put. There is neither allegation nor proof that the angle cock in question was insufficient. The allegation that it was worn, dirty, out of alignment and worked very hard, describes a defective tool or appliance. The evidence shows that the angle cock was and had been for many years standard equipment on railroads throughout the United States. The court erred in refusing to submit the interrogatory.

Defendant's offered instructions 4, 5 and 7 were peremptory instructions, respectively directing the jury to find the defendant not guilty if they believed the angle cock "was not defective"; that the injuries were solely and proximately caused by the manner in which plaintiff operated the angle cock and "not by any defect in the same," and that the difficulty in turning the angle cock "was not due to any defect in the angle cock." Plaintiff's counsel specifically stated he had no objections to the first instruction in which the word "defective" was used. For the reasons hereinbefore stated, defendant was not required to negative the sufficiency of the angle cock. If as plaintiff contends the three instructions were merely different ways of expressing the same proposition and defendant was not entitled to have all of them given to the jury, it was the duty of the court to select one and refuse the others, or to require defendant's counsel to make an election. Without deciding whether defendant was

entitled to have all of the instructions given, we do hold that the court erred in refusing all of them.

For the errors of the court in excluding the evidence offered by defendant and in ruling on defendant's interrogatory and offered instructions 4, 5 and 7, we are again forced to reverse the judgment in plaintiff's favor and remand the cause. We do not determine whether or not the verdict is against the manifest weight of the evidence or whether the damages are excessive. It is unfortunate that in neither of the two trials in which a verdict was returned has defendant had a trial free of prejudicial error.

The judgment is reversed and the cause remanded for further proceedings in conformity with the views expressed herein.

REVERSED AND REMANDED.

BURKE and FRIEND, J. J., Concur.

A 58

46226

JOHN E. DEMPSTER, Appellee,	)	
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation, Appellant.	)	2 I.A.2d 47

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $75,000 entered in a common law action brought by plaintiff, a switchman in defendant's Englewood yard, for personal injuries claimed to have been sustained April 22, 1949 in a caboose to which he had gone to get his lantern, jacket and mittens to take to defendant's coach yard, 43rd and Root streets, where he was being transferred at his request.

In its answer defendant admits that plaintiff was an employee but denies that he was on duty at the time and place of his injury. On appeal it raises for the first time the question of plaintiff's right to maintain a common law action and insists that his rights, if any, are under the Federal Employers' Liability Act or the Illinois Workmen's Compensation Act. As it concedes there is no evidence of interstate commerce, there can be no liability under the Federal Employers' Liability Act. (45 U. S. C., chap. 2, sec. 51.) Not only did defendant fail to raise the question of misconception of remedy in the trial court, but it joined issue on plaintiff's allegation of due care and caution for his own

safety and went to the jury on that issue. It thereby asserted a defense not available in proceedings under the Workmen's Compensation Act and, had it sustained its denial of due care by plaintiff, would have escaped all liability for plaintiff's injuries. It should not now be permitted to change its position. No question of jurisdiction is involved. The court had jurisdiction of the parties and of the subject matter--a common law action for personal injuries proximately caused by the negligence of the defendant. The Workmen's Compensation Act does not take that jurisdiction from the court. Neither does it change the law in respect to such actions, except in so far as it deprives employees who are entitled to compensation under its terms of the right to sue at common law for injuries. If relief to plaintiff was barred by the provisions of the act, that fact should have been brought to the attention of the trial court by motion to strike, answer or other action. Morris v. Taylor Coal Co., 206 Ill. App. 100, 102; Wolff v. Foote Bros. Gear & Machine Co., 207 Ill. App. 311.

Plaintiff had been employed by defendant since 1943. In April 1949 he was still on the Extra board, his seniority not entitling him to a regular job. He was working principally at the Englewood yard. There being a shortage of lockers, he had been given permission by his superiors to put his lantern, jacket and mittens in the caboose on the caboose track in the yard. He worked the night of April 20th.

The next day he was a successful bidder for a job at the coach yard and was to go to work there on the 23rd. On the night of April 21st he reported to the Extra board but did not get work. He spent the remainder of the night around 63rd and State streets, in the vicinity of defendant's Englewood station and yard. Between 8 and 9 o'clock in the morning of the 22nd he had breakfast at a restaurant at 6235 S. State street operated by Peter C. Sinadis. He went to the yard, talking to Culp, a switch tender, a few minutes. He then, about 10 o'clock, went to caboose 18659 on track 22 to get his equipment. He says the caboose was the first out on the north end of the track--about 5 or 6 car lengths from the end. There were three lockers in the caboose. He did not find his equipment in the first locker he opened. He went back to where the keys were to get the key for another locker and when on his way to the locker the caboose was hit by another caboose or engine, a terrific impact, coming from the north. He went through the air. The next thing he remembered was when Miller, a switchman, came into the caboose about 11 o'clock. He was lying in a pool of blood and was removed to the Mercy Hospital. His injuries were severe. The defendant does not complain that the damages awarded are excessive.

There is no direct evidence that a caboose or engine was moved onto track 22 from the north while plaintiff was in the caboose. Ferraro, the conductor of Miller's

crew, who had sent him to the caboose to find a hose, testified that he thought the caboose in which plaintiff was lying was the second caboose from the north end, or the caboose ahead--the first to the north. Ferraro was in the caboose a few minutes after Miller found plaintiff. Culp, the switch tender, went in shortly after plaintiff was taken to the hospital. They testified that the interior of the caboose was disarranged--things were not in their places. Ferraro said the table was out of place, a chair turned over and the backrests weren't where they belonged. Culp said the cushions were upset and the stove looked like it was displaced. Wayne, the yardmaster, who was in the caboose between the visits of Ferraro and Culp, testified that everything was in order. Each of these witnesses and Miller testified there was blood on the floor. Ferraro said the blood was getting harder and it looked like plaintiff had been lying there for some time. Miller, who did not notice the condition of movable things in the caboose, said the blood, about two and a half feet in diameter, looked a little dry like. Zandi, a member of another switch crew, testified that his crew switched out some cabooses that morning and he didn't know anything about the movement when plaintiff was injured; that he was not over there. All these witnesses, except Wayne, were called by plaintiff. Defendant confronted them with prior statements signed by them in which it appeared they had made conflicting statements. This conflict, if any, merely discredited the testi-

mony of the witnesses. It was not evidence of the facts previously stated by them. Moore v. The People, 108 Ill. 484.

Defendant sought to account for plaintiff's injured condition by the testimony of Walton, a coal hiker, who testified that he had seen plaintiff quite regularly in a tavern near the yard; that about midnight, before plaintiff's injury, he saw him fighting two men in the viaduct at 64th and State streets. He guessed plaintiff walked away. He didn't see a laceration across the front of his head. Plaintiff denies he had a fight. Sinadis and Culp, who saw him after the alleged fight and before he entered the caboose, testified that his appearance was normal. Plaintiff does not know what struck his car. He does know that the blow came from the north and that it was a terrific impact. He is corroborated to some extent as to the severity of the impact by the testimony of Ferraro and Culp as to the condition inside the caboose. The severity of his injuries is evidence of a hard blow to the caboose such as could only have been made by an engine or other rolling stock of the railroad. All switching movements in the yard were under the control of defendant. Plaintiff's testimony made a prima facie case. That case has not been overcome by testimony on behalf of the defendant, and the verdict for plaintiff cannot be disturbed for insufficiency of the evidence.

Counsel complain of the misconduct of plaintiff's counsel. While it appears from the record that plaintiff's

counsel did things of which we cannot approve, defendant has failed to preserve its objections. In the beginning of his opening statement counsel told the jury that defendant's assistant chief claim agent and attorney, then in court, had told him, counsel for plaintiff, "This case is dishonest." The statement was not only a breach of faith between counsel, who should be able to talk freely with one another without fear of having their statements repeated, it was an improper injection into the case of a matter prejudicial to defendant which could not have been proven under any circumstances. The court met defendant's objection and request that a juror be withdrawn with the statement to plaintiff's counsel, "You say what you are going to prove." The incident relating to the records of Mercy Hospital, including the X-rays of plaintiff, probably had a direct effect prejudicial to defendant on the size of the verdict. In this incident as in the former, defendant did not press for a direct ruling by the court and thereby waived the objection.

Finally, defendant objects that the trial court erred in excluding its proffered proof of the conviction of plaintiff in the federal court, under the name of John H. Roberts, for counterfeiting. The evidence shows that in addition to conviction for grand theft, for which he served in San Quentin Penitentiary in California, plaintiff also testified on cross-examination that he had served in the penitentiary at Fort Leavenworth. This testimony was later

stricken. Defendant called witnesses connected with the Chicago Police Department and the Secret Service of the United States, and also produced a mittimus issued from the District Court of the United States for the Northern District of Illinois, Eastern Division, committing one John H. Roberts to the United States Penitentiary at Leavenworth, Kansas, for a period of three years on a charge of "violation of section 265, Title 18, U.S. Code (Unlawfully passing and attempting to pass, utter, publish and sell counterfeit obligations of the United States, and possessing same with intent to defraud.)" The proferred testimony of these witnesses tended to identify plaintiff and John H. Roberts, named in the mittimus, as the same person, and to show that when arrested he had in his possession a counterfeit five dollar bill, currency of the United States. Our statute defining infamous crimes (Criminal Code, Ill. Rev. Stat. 1953, chap. 38, sec. 587) includes, with others, the crime of counterfeiting. It does not include the crime of possession of counterfeit money or currency. Defendant cites no authority to support its contention that the offense described in the mittimus is an infamous crime. It does refer to section 283 of our Criminal Code, which relates to gold and silver coin only. This can have no application to paper currency. The offer of proof being insufficient to bring the alleged conviction within our statute defining infamous crimes, the court did not err in refusing the evidence offered.

The judgment is affirmed.

Judgment affirmed.

Burke and Friend, JJ., concur.

A 59

46252

IN THE MATTER OF THE ESTATE OF JEREMIAH COLLINS, Incompetent; DANIEL J. COLLINS and HARRY M. COLLINS, Petitioners-Appellants, v. MARY E. C. O'HARA, MARY E. MADDEN, also known as Sister Michael Mary, O.P., JOSEPH M. MADDEN, PATRICIA MADDEN, COLETTA MADDEN, also known as Sister Catherine James, O.P., JEROME MADDEN, BERNADETTA MADDEN, also known as Sister Mary Amata, R.S.M., and JEREMIAH COLLINS, Respondents-Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

2 I.A.2d 47

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Daniel J. Collins and Harry M. Collins, petitioners, appeal from an order denying their petition to have their father Jeremiah Collins adjudicated incompetent because of old age, physical incapacity and imperfection, and deterioration of mentality, to manage his person and estate, and ordering and directing the clerk of the Probate court of Cook county to expunge from the record of said court the finding and orders entered on said petition.

The Probate court granted the prayer of the petition and appointed the Continental Illinois National Bank and Trust Company as conservator of the estate of Jeremiah Collins, and Mary E. C. O'Hara, daughter of the incompetent, as conservator of his person. The daughter, Mary E. C. O'Hara , appealed from the action of the Probate court and a trial was had in the Circuit court before the judge

without a jury. The only evidence introduced on the trial was the report of Dr. John J. Madden, appointed by the Probate court to examine Jeremiah Collins, received in evidence on stipulation of the parties in lieu of the testimony of the doctor after the last sentence of the report, stating the doctor's conclusion, had been excluded. This report recites that the doctor had examined Collins at his residence; that he was 96 years old, in a fairly good state of general bodily nourishment, completely without vision and exhibits a moderate degree of hearing defect; that fairly obvious signs of old age were present notably in the skin texture and in the arteriosclerotic condition of accessible blood vessels; that his general physical condition does not exhibit the serious degree of deterioration which one would expect in so old an individual; that in conversation with Mr. Collins it is found that his memory is defective and it would seem that this difficulty is of moderate severity and prevents him from quickly recalling to consciousness critically important facts and events; his general demeanor was complacent, he was quietly co-operative, no gross delusions were elicited and he did not seem to be experiencing hallucinatory difficulties; that he, the doctor, was unable to detect any mood disturbance and felt that Collins was neither unusually elated nor was he depressed.

From the testimony of the petitioner Daniel Collins it appears that his father was totally blind from February

1951 or 1952 (both dates being stated in the record); that he was the owner of one flat building, with a gross monthly rental of approximately $2,000, and the owner, jointly with Mary E. C. O'Hara, of another flat building the gross monthly rental of which is around $800; that the daughter, Mary, has lived with her father all of her life and for the last 20 years has been his bookkeeper and helping him with his business affairs; that she has paid all his bills for the last 10 or 12 years; that since his blindness she signs checks in his name by herself. It also appears that the father had owned a vacant lot, which was sold several years ago; the daughter Mary collects all rents, takes care of her father, who has had a nurse the last two years. He is clean, fully dressed each day in good order, is sometimes taken for a walk and also for automobile rides. No incident is shown of the mishandling of any business transaction by him or by his daughter. The filing of the petition followed shortly after a dispute between the witness Dan Collins and his father concerning a check which Dan had given for one month's rent which had been endorsed by Mary. The particulars of this controversy are not shown.

At the close of petitioners' evidence the trial judge stated that no prima facie case had been shown, and entered the order appealed from denying the prayer of the petition and directing that the orders entered thereon in the Probate court be expunged. The action of the trial court is affirmed.

Affirmed.

Burke and Friend, JJ., concur.

A 60

46308

SARA BISHOP, Appellee, v. LUCILLE MORRES, Appellant.	INTERLOCUTORY APPEAL SUPERIOR COURT COOK COUNTY

2 I.A.2d 48

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant in a suit for a partnership accounting appeals from an interlocutory order appointing plaintiff receiver of the subject matter of the litigation.

Plaintiff has not followed the appeal. The reason is obvious. The order cannot be sustained. It was error to appoint plaintiff as receiver over the objection of defendant. Bennedon v. Bill, 62 Ill. 408; Watson v. Cudney, 144 Ill. App. 624. Moreover, defendant filed a sworn answer specifically denying the material allegations of the complaint and setting up matters which if true constitute a complete defense. No receiver should have been appointed without further inquiry into the facts.

The order is reversed.

REVERSED.

BURKE and FRIEND, J.J., Concur.

61 A

46160

JAMES GERAGHTY, Appellee, v. BURR OAK LANES, INC., a corporation, Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY

2 I.A.2d 48

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

James Geraghty's action in the Circuit Court of Cook County against Burr Oak Lanes, Inc., to recover damages for alleged negligence in the construction and maintenance of a motor vehicle parking lot operated in connection with defendant's bowling alley business, resulted in a verdict for $28,000, upon which the court entered judgment. Motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial were overruled. Defendant appeals.

The mishap occurred on the evening of September 30, 1948, at about 8:30 P.M. It was a typical September evening, was not raining, the streets and ground were dry, and it was dark at the time. The defendant owned and operated bowling alleys at 127th Street (sometimes called Burr Oak Avenue) and Albany Avenue, about half a block outside of the city of Blue Island. The bowling alley building is located on the north side of 127th Street, approximately two blocks east of Kedzie Avenue. The building is a single story brick structure and is 100 feet by 130 feet, situated on a plot of ground which

extends 400 feet east and west on 127th Street and 260 feet north therefrom, and faces south. There are three entrances to the building, one in front, one on the east side and one on the west side. The front entrance is 66 feet from the south property line and the west entrance is 30 feet north of the south edge of the building. The driveway from 127th Street leading north into the premises is 60 feet wide. The usable parking space extends 175 feet west from the building and 230 feet north and south. The parking space was constructed prior to the opening of business in November, 1946. The base of the parking space consisted of eight to ten inches of brick that was bulldozed down, on top of which six to eight inches of gravel were laid. There were no cinders on the surface.

The parking space was divided into four parking areas by three lines of logs and railroad ties laid parallel and against each other running east and west. The space between the dividing markers was between 65 and 70 feet. The southernmost row of logs and ties was laid in line with the front of the building. The east end of these markers was 40 feet west of the southwest corner of the building and was laid in a line extending west therefrom for about 60 feet. There were two rows of logs and railroad ties in the south line laid parallel to each other side by side. The ties were seven inches high, eight to nine inches wide and nine feet long. The telephone poles were 14 to 15 inches thick on the large end and tapered

down to 9 to 11 inches and were about 30 feet long. These timbers had been creosoted and were a dark brown color. Svend Berg, president and manager of the defendant, is a building contractor and constructed the building and parking lot for the defendant. He had experience in building parking lots and had observed other parking lots and their construction. In 1947 and 1948 railroad ties and logs were placed in parking lots in different patterns to serve as bumpers and to keep parked automobiles in line and thereby leave room for cars to enter and leave the parking space. This was a normal parking lot procedure at the time. When plaintiff received his injuries, weeds three feet high had grown up and around the timbers.

Plaintiff was 22 years old at the time and lived in Chicago. He was a bowler in a bowling league. He left his home at about 8:00 P.M., driving a four door Plymouth sedan. He picked up four men who bowled with him, one of whom sat on the front seat. The other three men sat on the rear seat. This was the first time he had ever driven to the bowling alleys in his car and the first time he was ever in the parking lot. He had been to the bowling alleys on two other occasions, when he was driven there by friends. He knew the parking lot was there but was not familiar with it. He drove east on 127th Street and turned north (left) into the driveway leading into the parking lot. The parking lot was filled with automobiles

which were parked in double rows, running east and west, with the cars facing each other north and south. The headlights of his car were burning. After he pulled into the lot there was one vacant space in the first line of parked cars facing north. This vacant space was from seven to ten car widths west in the first lane. There were no other open spaces for him to park. He drove his car west (left) down this first lane a distance of 30 or 40 feet and then turned north (right) into the open space, stopped his car and parked it. Cars were parked west and east of his car and cars were parked facing south. There was another car facing south directly in front of his car. Between the cars facing north, including plaintiff's car, and the cars facing south, were the dividing markers of logs and ties.

He parked his car with about three feet of space on each side of it so that there was ample room to open the door. There was likewise a space of three or four feet between the east side of the car parked directly in front of his and the car immediately to the east of it. The entrance to the bowling alley building was northeast of where he parked his car. Near the entrance to the parking lot there was a pole or standard which supported an extension on which were attached two 200 watt lights eight to ten feet apart. These lights reflected on the driveway and part of the parking area. One of these lights pointed toward the northwest and one toward the southwest.

There were no light standards, fixtures or lights of any kind in any part of the parking lot. The lighting conditions were described as very poor. No lights lighted up the logs where plaintiff fell. There were no lights on posts in the parking lot area or along the north, south or west borders of the parking lot. The light nearest to the place where plaintiff fell was at the entrance of the parking lot, a distance of about 75 feet. These two lights were not flood lights and did not light up the lot nor the lane down which plaintiff had driven. Although there were two flood lights on the roof of the bowling alley, they were not burning at the time. There was a small light over the door at the entrance to the bowling alley building. There were no lights in the lane to the rear of plaintiff's car and it was as dark to the rear of his car as it was to the front. As plaintiff drove down the lane to park his car the headlights of the car lighted up the roadway on which he was traveling. As he drove along he saw the condition of the surface as it is shown in the photograph. The surface was fairly level except for "these high piles of earth that were there." The lane down which he drove his car varied in width from 7 feet to 10 or 12 feet. The photograph shows there were piles of gravel in the south part of the lane. It is apparent from the photograph that these piles of gravel did not interfere with the accessibility of the south parking lane.

After plaintiff had stopped his car, turned off the lights and shut off the motor, the other four men in the rear seat got out on the right hand side and stood by the right back fender until he had locked his car. Then plaintiff, followed by his four companions, all proceeded to walk north towards the next lane to get to the entrance of the bowling alley. He walked four or five feet when all of a sudden his left foot became wedged between the railroad tie and the telephone pole which were on the surface of the parking lot. He was walking normally. He was in no hurry to get into the bowling alley. He said he was looking where he was walking. He was not carrying anything. He did not see the telephone pole or railroad tie until after he had fallen and did not know of their existence. The ground around the telephone pole and railroad tie was covered with weeds and grass and the weeds extended above the top of the telephone pole and tie. The weeds were brown in color and were estimated to be anywhere from 12 inches to 3 feet in height. There were no lines or markings of any kind outlining the stalls for the automobiles to park. There was no attendant on duty in the parking lot. Neither the plaintiff nor the men who were with him saw the log or railroad tie before plaintiff fell. The telephone pole was approximately 10 inches in diameter and ran in an easterly and westerly direction. The railroad tie was approximately 8 inches square and was located on the

south side of the telephone pole. The railroad tie pointed in a northeasterly and southwesterly direction with the northeast end against the pole and the southwest end leaving an open space approximately 8 inches between the pole and the tie. It was in this angle or space, which was obscured by weeds, in which the plaintiff caught his foot and fell. Neither the pole nor tie had been painted. They had been on the surface of the parking lot for two or three months prior to the occurrence. Plaintiff's left shoulder was dislocated by his fall. He was taken to St. Francis Hospital in Blue Island. He was severely and painfully injured. He returned to the scene of the occurrence the next day. A picture received in evidence as plaintiff's exhibit 1, taken four days after the accident, shows the surrounding conditions as they were at the time of the occurrence.

Defendant maintains that plaintiff was guilty of contributory negligence as a matter of law. Plaintiff answers that the question of contributory negligence was properly submitted to the jury as a question of fact. In considering this point we view the testimony in its aspect most favorable to the plaintiff. The lighting conditions in the vicinity where he fell were poor. When he got out of his car he turned off the headlights. He did not know the railroad tie was there. The space was dark. He saw the weeds which were three feet high. He had seen the weeds when he drove in. He said it was so dark he could not see objects on

the ground and that he was walking in a dark place. He said if he had chosen to walk down the lane in which he had driven his car, he would be walking towards the light shown in the picture. He did not take a route that he knew to be safe by walking to the rear of his automobile, then east to the main driveway and then north to the west entrance which was lighted. The only difference in choice of routes was the half length of his car. He was under no compulsion to pursue the route selected in preference to the safe route down the lane over which he had driven. He ignored the only route known by him to be safe and selected an unexplored route through weeds and darkness. He had a choice of routes. Although the question of contributory negligence is ordinarily for the jury, yet when there is no conflict in the evidence and the court can clearly see that the injury was the result of the negligence of the injured party, it should not hesitate to instruct the jury to return a verdict for the defendant. Illinois Central R.R. Co. v. Oswald, 338 Ill. 270. In Sims v. Chicago Transit Authority, 351 Ill. App. 314, in reversing a judgment we said that plaintiff, having taken a hazardous route, she must be presumed to have contemplated the danger of it and that it was then her duty to proceed with care and caution, and that the law is well settled that a person has no right to knowingly expose himself to danger and then recover damages for an injury which might have

been averted by the use of reasonable precaution for his own safety. No duty devolved upon defendant to provide a sidewalk leading from the parked automobiles to the building. It is not contended that parking lots are constructed in that manner. In Brooks v. Sears Roebuck & Co., 19 N. E. (2d) 39, the Supreme Court of Massachusetts, in speaking of wooden curbs in a parking lot, said (41):

> "It is a matter of common knowledge that similarly constructed curbs exist in parking spaces in this Commonwealth. They are incidental to the ordinary and common construction of such places and are structures the plaintiff should have expected to find in the parking space involved. Cowen v. Kirby, 180 Mass. 504, 506, 62 N.E. 968; Heaney v. Colonial Filling Stations, Inc., 262 Mass. 338, 341, 159 N.E. 916. They facilitate the orderly parking of motor vehicles and tend to prevent collisions. * * * The defendant had a right to assume in the actions of those who frequented its premises 'the exercise of ordinary circumspection as to their footing.'"

Plaintiff cites Pollard v. Broadway Central Hotel Corp., 353 Ill. 312, in support of his position. In that case the plaintiff, when hurt, was walking down a corridor set aside and used by guests for entrance to the lobby of the hotel and there was nothing nor anybody to warn plaintiff of the drop in the floor levels. In Acme Markets, Inc., v. Remschel, 181 Va. 171, 24 N. E. (2d) 430, cited by plaintiff, in which the plaintiff fell on an eight inch stump in the darkness of defendant's parking lot, the court held that the store customer occupied the position of an invitee while upon the store parking lot. The stump was allowed to remain in an area where pedestrians were expected to and did walk in order to go to and from the store. The defendant had notice

of the dangerous condition of the stump as a customer had previously damaged the muffler and gas tank of his automobile. The Virginia court held that the question of due care was properly submitted to the jury, and pointed out that under Virginia law the burden devolved upon defendant to prove contributory negligence on the part of plaintiff. In Ellguth v. Blackstone Hotel, Inc., 340 Ill. App. 587, (affirmed 408 Ill. 343,) an employee of defendant offered to and did lead plaintiff through a dark passageway where plaintiff was injured. The employee of defendant was familiar with the conditions in the tunnel, whereas plaintiff was not. The court held that the question of contributory negligence was properly left to the jury.

We have studied all of the cases cited by plaintiff and are of the opinion that they do not support him in the factual situation presented on the record in this case. If plaintiff could see where he was walking and failed to look, he was guilty of contributory negligence. If he walked through heavy bushy weeds three feet high in total darkness, he should have known that there was no pathway there and he was equally guilty of contributory negligence. He did not claim to have been deceived by the weeds. He saw them when he first drove in and parked his car and again when he walked north from his car. He did not walk in an area patently set aside for pedestrians, nor did he walk down an unlighted aisle, passageway or corridor as in some of the citations relied upon by the plaintiff.

The presence of the weeds was sufficient warning to any person exercising ordinary care that the area ahead was not used or entitled to be used by pedestrians. We find as a proposition of law that the contributory negligence of the plaintiff was the proximate cause of the injury which he suffered and that a verdict should have been directed. Therefore, the judgment of the Circuit Court of Cook County is reversed and the cause remanded with directions to enter judgment notwithstanding the verdict for the defendant and against the plaintiff.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

NIEMEYER, P. J., and FRIEND, J., Concur.

6V A

46197

BITUMINOUS CASUALTY CORPORATION, an Illinois Corporation, Appellant, v. HARLOW H. BELDING, individually and doing business as BELDING CONSTRUCTION and ENGINEERING COMPANY and BELDING ENGINEERING COMPANY, a corporation, Appellees.	APPEAL FROM CIRCUIT COURT COOK COUNTY

2 I.A.2d 49

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a complaint filed in the Circuit Court of Cook County the Bituminous Casualty Corporation prayed for an accounting and judgment against Harlow H. Belding, doing business as Belding Construction and Engineering Company, hereinafter for convenience called the individual defendant, and Belding Engineering Company, a corporation. Plaintiff is engaged in the casualty insurance business. The defendants are construction contractors, with their principal office at West Chicago, Illinois. The business was operated by Harlow Belding individually under the name of Belding Construction and Engineering Company from November 14, 1940 until October 1, 1950, when it was transferred to Belding Engineering Company, a corporation, which since that time has operated the business. At the special instance and request of the individual defendant, plaintiff issued and delivered to him certain Workmen's Compensation and Public Liability insurance policies and renewals thereof covering the period from November 14, 1940 to December 31, 1951. On

October 1, 1950, the interest in the policies of the individual defendant was assigned to the corporate defendant. The policies remained in force until December 31, 1950, when they were canceled by the plaintiff under the terms thereof. Each policy provided that the premium be based upon the character and classification of work performed by the various employees and the amounts of their payrolls, which in the first instance were to be estimated and thereafter to be ascertained by periodical reports or audits to be made by the defendants.

The defendants from time to time made reports purporting to disclose the payroll. From time to time the defendants permitted plaintiff to audit and inspect their records and books, which they represented contained all of the wages and salaries paid to employees. The reports made by the defendants were false and untrue in that they did not disclose the true and correct amounts paid as salaries and wages to the employees. The books and records which defendants permitted plaintiff to examine from time to time were not the true, accurate and correct books and records and did not contain the true and correct amounts paid to the employees for wages and salaries. Defendants made such false and untrue reports and furnished false, untrue and incorrect books and records to the plaintiff for examination for the purpose of showing a less amount of payroll so that the premiums that would be payable under the policies would be less than the amounts they should have paid. This was done intentionally

and wilfully for the purpose of cheating and defrauding the plaintiff out of its just premiums. At the time the reports were made and the books and records exhibited, plaintiff believed that the reports, books and records were true and correct and fully and fairly disclosed the sums paid to the employees for wages and salaries. The first time that plaintiff learned that the reports, books and records submitted by the defendants purporting to show the payroll were false and untrue was between "December 31, 1940 and December 31, 1950," when in connection with audits then being made by the plaintiff it "accidentally" discovered the true books and records showing the true and correct payrolls and the amounts paid to the employees for wages and salaries, "which books and records were carefully hidden and kept" so that plaintiff would not be in a position to see them. During "said period" the plaintiff for the first time learned that the previous reports, books and records submitted by the defendant from time to time for the purpose of ascertaining the premiums due were false and untrue, and for the first time learned the true and correct payrolls showing salaries and wages paid to the employees and was for the first time in a position to truthfully ascertain the correct amount of premiums payable under the policies. When from time to time it accepted payments of premiums under the policies, plaintiff did not know and could not have known of the falseness and incorrectness of the reports, books and records. If it had that knowledge it would not

have accepted the premiums and would have insisted upon the payment of the amounts due according to computations based on the true payrolls. Based upon the true and correct payrolls of the wages and salaries paid to the employees at the premiums fixed in the respective policies, there is due to the plaintiff from defendants over and above the amounts theretofore paid the sum of $14,189.43 plus interest at the rate of five percent per annum on the yearly deficiencies at the end of "each year beginning with December 30, 1941." The deficiency in the premiums paid from December 31, 1949 to December 31, 1950, the last year in which the policies were in effect, amounts to $4,384.44. Plaintiff attached an exhibit of ten pages showing in detail the remuneration reported or found upon audit for the various classifications; the amount due under the reports and audits; the rate of premium; the amounts paid based thereon; the true and correct amount of remuneration and payroll which should have been reported or would have been disclosed if the true and correct books and records had been exhibited; the amount of premiums that would be due therefor based upon the correct payrolls; and the amount remaining unpaid after giving credit for the sums paid from time to time. The exhibit also purports to show the true and correct figures which should have been reported by the defendants or would have been ascertained from audits if the reports, books and records furnished by defendants were true and correct and honestly reflected the payrolls. On or about October 1, 1950, the individual

defendant sold and assigned "all of his business in bulk" to the corporation.

Summons was served on the corporation. The individual defendant was not served. After four extensions to file its answer the corporate defendant filed a motion for summary judgment. The court denied plaintiff's motion to strike the motion for a summary judgment and also denied its motion for a partial judgment. Plaintiff then filed an affidavit in opposition to the motion for summary judgment. The court found that there was no triable issue of fact, that the check for $1,537.86 tendered by the corporation and subsequently certified discharged the defendants from all the demands of plaintiff, ordered that defendants deliver the certified check to the plaintiff and that judgment be entered against it. Plaintiff appeals.

The purpose of a summary judgment proceeding is not to try an issue of fact, but to ascertain whether there is an issue of fact to be tried. The right of the moving party to such a judgment must be free from doubt. See Scharf v. Waters, 328 Ill. App. 525; Great Atlantic & Pacific Tea Co. v. Town of Bremen, 327 Ill. App. 393; Bertlee Co. Inc. v. Illinois Publishing and Printing Co., 320 Ill. App. 490; Macks v. Macks, 329 Ill. App. 144. Some of the confusion in the instant case undoubtedly arose because the defendants did not answer the complaint. We have said that on a motion for summary judgment the pleadings should be considered in order that the court may know what the issues are. A motion by a

defendant for summary judgment presupposes that the pleadings join issue. At the outset we are confronted with the contention of plaintiff that the individual defendant, not having been served and not having appeared, the court did not have jurisdiction to make any determination of the cause as to him. The record shows that the individual defendant joined in the motion of the corporate defendant and in effect adopted such motion. It is well established that if a defendant makes a motion, files a pleading or takes any other step which the court would have no power to dispose of without jurisdiction of his person, such action on his part will be a submission to the jurisdiction of the court. Supreme Hive Ladies of Maccabees v. Harrington, 227 Ill. 511, 525; Welter v. Bowman Dairy Co., 318 Ill. App. 305, 316; Mitchell v. Comstock, 305 Ill. App. 360, 374. We find that the individual defendant submitted his person to the jurisdiction of the court.

The trial judge sustained defendants' contention that the check for $1,537.86, when certified, satisfied all the claims of plaintiff. An affidavit for the defendants by T. E. Green says that he is a director and assistant secretary and treasurer of the Harrison-Brewster Agency, hereinafter called the Agency, which had an agency contract with plaintiff from March 1, 1940 to August 9, 1948; that thereafter it collected premiums for plaintiff on policies written through the Agency; that the procedure for billing premiums due plaintiff was for the latter to bill the Agency, which in

turn would bill Stephen J. Maloney, who was a broker for the corporate defendant; that the bill was paid directly to the Agency, which would deposit the check to its account, that in addition to the account of plaintiff with the defendants, the Agency had a number of other accounts for the plaintiff; that every month plaintiff would send a statement of the outstanding bills which were to be paid to plaintiff within sixty days; that Maloney is not connected with the Agency except that he maintains desk space in its office in Chicago; that on May 8, 1951, Maloney turned over to Green a letter dated May 7, 1951, from the attorneys for the corporate defendant, together with an uncertified check of that defendant for $1,537.86 and a payroll audit report; that on May 9, 1951, Green wrote a letter to plaintiff for the attention of J. E. Folkers, its Chicago manager; that on May 15, 1951, Folkers came to his (Green's) office and stated that he wanted the check which he said he thought he was going to have certified; that on May 29, 1951, he (Green) received a letter from E. D. McMullin, assistant manager of plaintiff, enclosing the check which "had been certified"; and that on May 31, 1951, he wrote a letter to the corporate defendant, which he delivered to Maloney, the broker of that defendant. That letter does not appear in the record. Green states that on June 7, 1951, he received a letter from the attorneys for the corporate defendant dated June 6, 1951.

The letter of May 7, 1951, from the attorneys is addressed to the Agency for the attention of Stephen J. Maloney, with the heading "Re: Belding Engineering Company-Bituminous Casualty Co." and reads:

"A statement was recently submitted to Belding Engineering Company, a client of this office, in connection with insurance premiums allegedly due on insurance with Bituminous Casualty Company for Workmen's Compensation, Public Liability and Property Damage coverage. Bituminous Casualty Company carried the insurance in these matters for our client for approximately 10 years. The insurance company's payroll auditors computed the premium on an established basis. The statement which was submitted to our client was not submitted pursuant to the contract, nor pursuant to their established system of auditing. Based upon the contracts and Bituminous' procedure in auditing, we are enclosing a payroll audit report covering the period from December 31, 1949 to December 31, 1950. This report establishes that additional premiums are due for Workmen's compensation coverage of $1,258.53 and for public liability and property damage in the sum of $279.33, making a total of $1,537.86.

"Consequently, on behalf of our client, we are enclosing our client's check No. 1736, payable to Harrison-Brewster Agency in the sum of $1,537.86, in full and complete satisfaction and discharge of any and all claims which Bituminous Casualty Company may have against our client. Our client is certainly willing to pay the insurance company the sum that is due it, but no more."

A letter of May 9, 1951, from the Agency to plaintiff at its Chicago office, with the heading "Re: Pol. WC 126521 & PL 12602 Belding Engineering Co." reads as follows:

"Enclosed herewith find payroll report and copy of letter received from the representatives of captioned assured in connection with earned premium under Compensation and Public Liability policies for period, December 31, 1949 to December 31, 1950. The check in the amount of $1,537.86 is being held pending your advices."

A letter dated May 29, 1951, from the Chicago office of plaintiff to the Agency stated that it was returning therewith corporate defendants' check dated April 26, 1951, to the order of the Agency for $1,537.86, with the request

that the Agency return the check to the corporate defendants as unacceptable because it is "not in the correct amount and this former assured and their Attorney are cognizant of the fact that the premium balance is a considerably larger amount." Apparently, the Agency wrote defendant corporation on May 31, 1951, returning the check. This letter does not appear in the record. It is mentioned in the affidavit of Green and also in a letter dated June 6, 1951, from the corporate defendants' attorneys. The last mentioned letter addressed to the Agency acknowledged the letter of May 31, 1951, returning the check, called attention to the fact that when the check was forwarded on May 7, 1951, it was not certified, that the check returned was certified on May 17, 1951, that it was in the hands of the Agency or plaintiff for approximately a month, that because of the certification plaintiff had accepted payment of all sums due by "Belding Engineering Company" to plaintiff, and that the check was being returned.

On June 13, 1951, the attorney for plaintiff in a letter to "Belding Construction & Engineering Co." returned the check and stated that the correct balance due on the premiums on the various policies "issued to you" is $14,189.43, and asked that a check for the correct balance be forwarded. In a letter dated June 19, 1951, addressed to the attorney for plaintiff and entitled "Re: Bituminous Casualty Corporation," the attorneys for defendants stated that plaintiff by its action accepted the check in full

payment "of any amount due" and that the return of the check "is not accepted.". The letter closed with the statement that "the sum of $1,537.86 is being held available to your client at any time." The check dated April 26, 1951, is drawn by "Meric W. Belding" on the West Chicago State Bank, payable to the order of the Agency. The corporate defendant's name is printed at the top of the check but its name does not appear as a drawer. The check was certified by the bank on May 17, 1951.

In opposing the motion for summary judgment, plaintiff filed the affidavit of J. E. Folkers. He denied that the Agency collected any premiums for plaintiff after July 6, 1948, and said that all the transactions between plaintiff and the defendants in relation to the insurance policies were with Stephen J. Maloney, who was the broker for the defendant. He denied that there was any authority in the Agency to collect premiums for plaintiff. He stated that Maloney had desk space in the office of the Agency, that the check was intended to cover the insurance premiums on the payroll report for the period of one year ending December 31, 1950, that it was not intended to cover the entire audit, that the check was not endorsed to the plaintiff by the payee, and that the certification is not for the benefit of plaintiff but for the benefit of the Agency.

The affidavits of both parties are subject to criticism in that they do not show that they are made on the personal knowledge of the affiants and do not affirmatively

show that the affiants, if sworn as witnesses, can testify competently thereto. They are also replete with conclusions. The exhibits, however, are helpful in disclosing the transactions and show that the check was returned by the plaintiff on the basis that the balance "is a considerably larger amount." The fact that the check was made payable to the Agency and not endorsed to plaintiff was not raised and appears to be an afterthought. Sections 186 and 187 of the Negotiable Instrument Act (Pars. 208 and 209, Ch. 98, Ill. Rev. Stat. 1953) provide that where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance, and that where the holder of a check procures it to be accepted or certified, the drawer and all endorsers are discharged from liability thereon. We find that plaintiff as a holder of the check procured it to be certified and that such certification is equivalent to an acceptance. The check was intended for the plaintiff. The plaintiff made the decision to certify it and also to return it after such certification.

The question that remains for decision is whether the check for $1,537.86 accompanying the letter of May 7, 1951, was tendered and accepted (by the certification) with the intention of discharging all claims of plaintiff or only the claim for the underpayment of premiums during the year ending December 31, 1950. The complaint claims underpayment of $14,189.43 during the ten year period of which $4,384.44 arose during the last year. The plaintiff asserts

that during the last year it "accidentally" discovered the true books and records of the defendants showing the true and correct payrolls, which had been hidden by defendants, and that it then learned that previous reports, books and records submitted from time to time were false and untrue. The letter of May 7, 1951, refers to a statement recently submitted to the corporate defendant in connection with insurance premiums allegedly due on insurance with plaintiff. It said that the plaintiff's auditors computed premiums "on an established basis" and that the statement submitted "to our client" was not submitted pursuant to the contract nor to "their" established system of auditing, and that based upon the contracts and plaintiff's procedure in auditing "we are enclosing a payroll audit covering the period from December 31, 1949 to December 31, 1950." The letter says "this report establishes that additional premiums are due for Workmen's compensation coverage of $1,258.53 and for public liability and property damage in the sum of $279.33, making a total of $1,537.86," and concludes by enclosing "our" client's check payable to the Agency for $1,537.86 "in full and complete satisfaction and discharge of any and all claims which Bituminous Casualty Company may have against our client. Our client is certainly willing to pay the insurance company the sum that is due it, but no more." This letter does not seek a compromise. It is based on an audit for the last year which "establishes" that there was an underpayment

for that year of $1,537.86. We think the check was tendered in satisfaction of the claim for the last year. This construction was adopted in the letter of the Agency to plaintiff's Chicago office of May 9, 1951, which enclosed the payroll report and a copy of the letter of May 7 "in connection with earned premium under Compensation and Public Liability policies for period, December 31, 1949 to December 31, 1950," and stated that "the check is being held pending advices."

The Green affidavit said that Folkers came to the Agency's office on May 15, 1951, took the check and said he thought he was going to have it certified. In a letter of May 29, 1951, plaintiff returned the check to the Agency. It had been certified. From the affidavits and exhibits we find that the check for $1,537.86 was intended to cover the underpayment for the last year and when the plaintiff procured the check to be certified it accepted that payment in full satisfaction of its claim for $4,384.44 for the final year. Should defendants file an answer, there will be left for adjudication any issues that may arise covering the premiums for the preceding nine years.

The decree of the Circuit Court of Cook County is reversed and the cause is remanded with directions to enter a partial judgment in favor of the plaintiff for $1,537.86, and for further proceedings consistent with these views.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

NIEMEYER, P. J. and FRIEND, J., Concur.

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46220

ELEANOR KANE, Administratrix of the Estate of Barney Kane, Deceased,	)	APPEAL FROM
Plaintiff - Appellee,	)	MUNICIPAL COURT
v.	)	OF CHICAGO.
SAM DUNN,	)	
Defendant - Appellant.	)	

2 I.A.2d 50

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On November 24, 1947, Sam Dunn leased to Barney Kane the store at 1053 West Madison Street, Chicago, to be occupied as a tavern for the period from December 1, 1947 to November 30, 1952, at a rental of $12,000, payable in monthly installments of $200. The lessee agreed to insure the plate glass, furnish dram shop insurance, do all the interior repairs at his expense, furnish heat and hot water to other tenants and occupants and to insure the furniture and fixtures. The lessor agreed to allow the lessee to use the furniture and fixtures in the premises. The lessee deposited $2,000 with the lessor to secure the performance of all the conditions, covenants and provisions in the lease, which was to be retained until December 10, 1952. If the lessee defaulted and whether or not the lessor had terminated the lease or the right of lessee's possession, the $2,000 was to be forfeited and retained by the lessor as liquidated damages. In no event was any action to be brought to recover the deposit prior to December 10, 1952.

Barney Kane took possession of the premises and paid the monthly rental until his death on March 6, 1948. On the death of her husband, Eleanor Kane, the widow, took possession of the premises and operated the tavern. The tavern was closed only on the day of the funeral. At the time of the lessee's death the liquor license was in his name. The widow did not take out a new license immediately on his death but ran on the old license until it expired in May, 1948. From a conversation with the landlord and other actions the widow considered that the written lease was canceled by mutual agreement and possession under that lease surrendered, and that she became a month to month tenant. She was appointed administratrix of the estate of her deceased husband. As such, she filed an amended statement of claim in the Municipal Court of Chicago against Sam Dunn to recover the $2,000 deposited as security. Defendant filed a counterclaim for $2,400 for rent at $200 a month for the twelve month period from May 1, 1949 to April 30, 1950. Issue was joined. In a trial before the court without a jury there was a finding and judgment in favor of the plaintiff for $2,000 and a finding and judgment against the defendant on the counterclaim. Defendant appeals.

Plaintiff testified that several days after the death of her husband she spoke to the defendant on the telephone. She told him that her husband had passed away; that she had been down to the City Hall and been told she could not operate the tavern without a license in her name as an individual; that it would be necessary for her also to have

an individual lease on the premises in order to procure a license; that the defendant asked her how long she wanted to lease the premises; that she informed him she was not feeling well, had two small children; and that she could not determine for how long a period she would wish to operate the tavern. She then asked him what he would do about this. The defendant told her to "disregard the old lease" and "Forget it, and I will put you on a month to month basis, being as you don't know how long you will remain. Is that satisfactory?" She answered, "Yes, I guess if that is the way it's handled, it is satisfactory." Plaintiff further testified that the monthly rental was to be $200 plus water payments. She said that after the telephone conversation she went into possession of the premises. After going into possession individually she paid the rent monthly with her own funds and checks personally signed. Although not sure of the point, she believes that she changed the telephone number. She did not change the signs on the outside of the tavern. About five weeks after her conversation with the defendant she procured a liquor license in her own name. While Mrs. Kane was out of town in the spring of 1949 there was a charge of a violation of an ordinance in the tavern, and in April, 1949, her liquor license was revoked. Mrs. Kane closed the tavern and ceased paying rent. She testified further that in 1949, after the tavern was closed, she was sued individually for possession and for the rent claimed to be due. Plaintiff nonsuited that case. She testified that

the commencing of that suit caused her to examine the papers in her husband's box in their apartment and that this was the first time she learned that the sum of $2,000 was on deposit with the defendant. The defendant testified that when Mrs. Kane spoke to him on the telephone and asked for a new lease he told her he could not give her a new lease, that she had a lease and that she could operate under her husband's lease.

The basis in law for the decision in the instant case is stated by the Supreme Court in Alschuler v. Schiff, 164 Ill. 298, (304):

> "We hold it to be the law of this State, that where it is not sought to alter or change the terms of a contract under seal, still leaving it in force, but where the object is to show that such instrument has been abrogated, canceled and surrendered, the question is one of fact for a jury, and evidence thereon is admissible."

See also Selimos v. Marinos, 323 Ill. App. 144; Jacob v. Mundell, 267 Ill. App. 160. Plaintiff in the case at bar introduced evidence to support her theory that there was a mutual agreement to surrender and cancel the lease and to relet the premises to her as an individual as a month to month tenant. She testified and the defendant admits that she personally paid the rent for the premises. The tavern license was taken in her name and she, as an individual, operated the tavern. In 1949 she was sued individually by the defendant to obtain possession and to recover rent then claimed to be due and owing. She said that defendant did not inform her of the deposit of $2,000. Where a cause is tried by the court without a jury, the determination of the credibility of the witnesses and the weight to be accorded to

their testimony is committed to the trial judge, and where evidence is merely conflicting this court will not substitute its judgment for that of the trial judge. When the plaintiff and defendant mutually agreed to cancel the lease and she took possession as an individual, as administratrix she was entitled to a return of the deposit held by the defendant as security for the faithful performance of the lease.

The record supports the judgment. Therefore, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P.J. AND
FRIEND, J., CONCUR.

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46279

GEORGE DRAGOSVICH, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
ALLSTATE INSURANCE COMPANY, an Illinois Corporation, Appellant.	)	OF CHICAGO.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

George Dragosvich filed a statement of claim in the Municipal Court of Chicago on a contract of insurance issued by the Allstate Insurance Company covering plaintiff's automobile for loss caused by collision. A trial before the court without a jury resulted in a judgment against defendant for $1093.00, including $218.00 as attorneys' fees for vexatious delay, to reverse which defendant appeals. Defendant's theory is that the plaintiff, at the time he applied for the policy of insurance, made misrepresentations which were material to the risk, the falsity of which voided the policy in that he represented to its agent that no insurer had ever canceled any automobile insurance issued to him, which representation was false, and that he further represented to its agent that he had only one prior accident for which he was not at fault, when in fact he had other accidents in which he was at fault and which he failed to disclose when he applied for the insurance. Plaintiff's theory is that he made no misrepresentations, that he signed an application for the insurance filled out by defendant's agent who either falsely or inadvertently wrote incorrect information therein,

that he thus informed the defendant of the cancelation of his insurance, that the defendant, bound by the act of its agent, is estopped to deny the contract, that the alleged misrepresentation is not a warranty and merely a declaration not material to the risk, and that defendant failed to show misrepresentation of a material fact.

Plaintiff urges that as the defendant did not plead the misrepresentations of the plaintiff as to prior accidents, that issue is not before us. The matter of prior accidents was brought in during the direct examination of plaintiff. During the cross-examination it was brought out that plaintiff had other accidents which he did not reveal on direct examination and which were not disclosed at the time he applied for the insurance. This defense was raised during the trial and argued in the briefs submitted to the trial judge. The oral opinion of the trial judge shows that he considered this defense. Plaintiff made no motion to strike any of the testimony concerning the prior accidents. The parties may, by the introduction of evidence, waive formal pleadings or form their own issues on the evidence introduced, and they may voluntarily present under the evidence issues not presented by the pleadings. An objection that a certain matter is not in issue under the pleadings may be waived where he introduces or brings out evidence bearing on the subject, or fails to object to evidence offered by the adverse party. 71 C.J.S. Sec. 573. Paragraph 3 of Section 42 (Par. 166, Sec. 42, Ill. Rev. Stat. 1953) of the Practice Act states that all defects in pleadings, either in form or substance,

not objected to in the trial court, shall be deemed to be waived. See Sacks v. Helene Curtis Industries, Inc., 340 Ill. App. 76, 86; Heil v. Kastengren, 328 Ill. App. 301, 310; Meyer v. Hendrix, 311 Ill. App. 605, 607; Pallasch v. United States Fidelity & Guaranty Co., 329 Ill. App. 257, 261. The plaintiff waived any right to say that there was no issue as to misrepresentation of prior accidents.

Defendant insists that misrepresentations made by the plaintiff at the time he applied for the policy that no policy of insurance issued to him was ever canceled, and that he was involved in only one accident, gave it the right to avoid the policy. Plaintiff answers that the statements contained in the application for insurance which are not part of the policy are not warranties but mere representations and inducements to the contract, and that notice to the agent of defendant of prior cancelation will estop it from avoiding the policy. On October 16, 1951, plaintiff went to defendant's counter for the sale of insurance in Sears' store on 79th Street, Chicago, talked to Edward S. Kelly, its agent, and told him he wanted insurance on his automobile. Plaintiff is a millright and has been employed by one corporation in the steel mills for 17-1/2 years. Mr. Kelly stated that he asked plaintiff certain questions which he answered and he recorded the answers on a printed application blank which plaintiff signed. Plaintiff received a carbon copy of the application, which he took home with him. Kelly said he asked plaintiff whether or not any insurer had ever canceled any automobile insurance issued or refused any automobile insurance to him

or any member of his household, that plaintiff answered "no" and that witness so recorded the answer on the application. He said that plaintiff never informed him that he had ever been canceled by any insurance company; that he asked plaintiff whether or not he had been involved in any accidents; that plaintiff told him about one accident in 1950; and that he recorded that information on the reverse side of the application. On the printed application is the question: "Has any insurer ever canceled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household?" There is a box provided to mark either "Yes" or "No" and the "No" is checked. On the reverse side of the application appears the question "Has applicant or his automobile been involved in any accident or loss?" There are spaces on the application together with questions pertaining to the details in regard to the accidents. One accident is noted on the application form, being the one of September, 1950, in which plaintiff's car was struck in the rear by another vehicle.

Plaintiff testified that he told Kelly that "I was dropped by an insurance company" and that he wanted insurance on his car; that his insurance had not yet terminated and would be terminated October 19, 1951; that Kelly told him to forget about being dropped and that he would take care of him; that he was never asked whether or not he was involved in any accident at the time he applied for the insurance; and that the agent read all the questions on the application except those pertaining to the cancelation and prior accidents. Plaintiff

stated that prior to applying to the defendant for a policy of insurance on his automobile his automobile insurance had been canceled and that he so informed Kelly. The application contained the description of one of the accidents which plaintiff admitted he had. Plaintiff stated that he signed it without reading it. Kelly had authority to obligate the company on a binder and under that authority could determine that the accident mentioned in the application would not be material to the risk and bind the defendant. Plaintiff received the policy about a week later. He said he did not read the application at the time he signed it or at any time until after the loss occurred. When he received the policy the declaration was attached to it. He read part of the policy and checked his coverages, which appeared on the declaration sheet. He testified that he did not read Paragraph 8 of the declaration, which reads: "During the past two years, with respect to the named insured or to any member of his household, no insurer has canceled or refused any automobile insurance nor has any license or permit to drive an automobile been suspended, revoked or refused." He was involved in an accident in September, 1950 while waiting for a stoplight and was hit by a truck. Shortly thereafter he was involved in another accident where "I cut into two girls and I hit the right side of this Tudor Ford." He had an accident in 1942 with a different car. He was in the car but was not driving when it overturned.

Representations made by an applicant for automobile insurance as to prior cancelation and frequency of accidents

are matters that materially affect the risk insured against. Defendant was entitled to know about prior cancelations so that it could investigate and determine the reasons therefor and whether or not it was willing to assume the plaintiff as a risk, and was entitled to know about prior accidents for the same reason. The evidence establishes that plaintiff made material misrepresentations both as to prior cancelation and as to accident experience. He seeks to avoid the misrepresentation as to prior cancelation by his testimony that he told Kelly about it, but has no satisfactory explanation for his failure to disclose the prior accidents. He said the agent never asked him about any accidents. Kelly testified that he asked about accidents and that plaintiff told him he had only one, which he noted on the reverse side of the application. Plaintiff's testimony on this matter is not worthy of credence since the details of one accident appear on the reverse side of the application. Paragraph 8 of the declaration states that during the past two years no insurer canceled any automobile insurance of plaintiff. The declaration is printed in regular size type on a half sheet inserted in a printed policy on which also appears the information in regard to coverages and premiums, name, address and identifying information on the automobile, and is a part of the policy. Paragraph 23 of the declaration states that by acceptance of the policy the insured agrees that the statements therein are his agreements and representations, and that the policy is issued upon reliance of the truth of such representations and that the policy embodies all agreements between himself

and the company or any of its agents relating to the insurance. Paragraph 18 of the policy entitled "Changes" states that notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or change in any part of the policy or estop the defendant from asserting any right thereunder, nor shall the terms of the policy be waived or changed except by endorsement issued to form a part thereof.

In Pollock v. Connecticut Fire Insurance Co., 365 Ill. 313, the court said (320):

> "Unless he has been misled by some act of the insurer, it is generally held that a person who accepts and retains the possession of an insurance policy is bound to know its contents."

Plaintiff cannot avoid the written provisions of the policy and declarations by his statement that he did not read them. At common law a principal is chargeable with and bound by the knowledge of his agent received while the agent is acting within the scope of his authority and in reference to a matter over which his authority extends. Parties may enter into a valid contract substituting a different rule for the common law doctrine and agreeing that it should not be binding as between them. Mr. Kelly had no right to waive or change any part of the policy or estop defendant from asserting any right under the policy, and the defendant has the right to avoid the policy where the false representation as to prior cancelation was contained in the declaration attached to the policy, even though the soliciting agent had knowledge of the falsity thereof. See Fay v. Swicker, 154 Ohio 341, 96

N. E. (2d) 196; Carlson v. Metropolitan Life Insurance Co., 221 Ill. App. 354; Rozgis v. Missouri State Life Insurance Co. 271 Ill. App. 155. We are also of the opinion that plaintiff failed to sustain the burden of proving estoppel or waiver. Spence v. Washington National Insurance Co., 320 Ill. App.149. When a jury has been waived we may reverse without remanding, although there is a conflict as to the facts. Ebbert v. Metropolitan Life Insurance Co., 369 Ill. 306, 310.

For the reasons stated the judgment of the Municipal Court of Chicago is reversed and the cause is remanded with directions to enter judgment for the defendant and against the plaintiff.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

NIEMEYER, P.J. and
FRIEND, J., Concur.

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46068

JOSEPH BRYANT, by ROSINE BRYANT, his mother and next friend, Appellee, v. JAMES E. CAIRNS, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY

2 I.A.2d 51

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $15,000.00 entered against him, upon the filing by plaintiff of a remittitur of $15,000.00, for personal injuries sustained by plaintiff on the Outer Drive in Jackson Park, Chicago, at about 12:40 a.m., on July 17, 1948, when he was five years old. Plaintiff and an older brother, together with their father, were crossing the Outer Drive to go fishing in Lake Michigan. They had walked through the park to 63rd Street, or Hayes Drive, where they traveled east on the south sidewalk along the street until they reached the Outer Drive. At that point there was no east-and-west crosswalk. The pedestrian sidewalk on the south side of Hayes Drive, upon reaching the Outer Drive, turned south on the west side of the Outer Drive to a passerelle or pedestrian overpass which was located about 150 to 180 feet south of Hayes Drive. The fishing party, however, did not walk down to the passerelle but, instead, continued walking directly east and proceeded to the center line of the vehicular drive, where plaintiff was hit by the south-bound automobile of the defendant. The drive at that point was about 80 feet wide. The father had to use both

hands to carry the fishing poles, blankets and food for the midnight expedition; the older boy had the fishing bait, and plaintiff carried a box-type flashlight. The two boys were holding hands from the time they left the curb to the time defendant's car struck plaintiff.

For a distance of about five blocks north of the place where plaintiff was standing the road was clear and level. While traveling that distance defendant's car pulled ahead about 500 to 600 feet from a group of cars which were even with him when he was first seen by plaintiff's father at a point approximately five blocks north of where they crossed the drive. Bryant, Sr., a truck driver, estimated the speed of defendant's car at about 55 miles per hour. The posted limit at the point of the crossing was 30 miles per hour. There is evidence that defendant's car, southbound prior to hitting plaintiff, had swerved over the center line into the northbound lane and back again into his half of the road, brushed a blanket carried by the father, and clipped the leg of the older brother; the headlight of the car struck plaintiff in the face while he was standing on the center line. There is also evidence that defendant did not sound his horn. He told police that he did not see plaintiff prior to the impact. The artificial light at the point of the crossing was good—three street lights, vehicle headlights, and a full moon on a clear dry night. Defendant told police he could see ahead of his car a distance of 20 to 25 feet at the time

of the accident. He did not testify at the trial.

The complaint charged negligence (1) in the operation of defendant's automobile so that it ran against and struck plaintiff; (2) in that the automobile was driven without giving any signal or warning of its approach or keeping any lookout for plaintiff or pedestrians generally; (3) in that defendant drove his automobile at a speed in excess of 55 miles per hour which was dangerous and excessive in view of the traffic conditions then existing on the highway; and (4) in that he drove his automobile over the center line and onto the lefthand side of the roadway. At the conclusion of plaintiff's evidence, and again at the conclusion of all the evidence, defendant submitted motions for a directed verdict, but all were denied. Defendant then submitted to the jury interrogatories concerning each particular charge of negligence. Subsequently, in defendant's motions for judgment notwithstanding the verdict and for a new trial, he requested the court to vacate and set aside the general verdict of the jury and each special finding.

Defendant takes the position that plaintiff failed to prove him guilty of negligence as charged in the complaint, and that therefore the court erred in refusing to direct a verdict in his favor and in denying his motion for judgment notwithstanding the verdict; and he argues that in any event the verdict is contrary to the manifest weight of the evidence. It is fundamental, of course, that motions for a directed verdict or judgment notwithstanding the verdict must be denied where there is any

evidence which, most favorably construed for plaintiff, would support his case. Brussell v. Lilly, 347 Ill. App. 533; Gorgone v. Hicks Oils & Hicks Gas, Inc., 345 Ill. App. 328. Considerable evidence was introduced, pro and con, as to the several specific charges of negligence. On the question whether defendant kept a reasonable and proper lookout, it is undisputed that the night was clear and dry, that plaintiff was in the center of the road, some 40 feet from the curb, and that he had reached the dividing line between the north and south lanes, along with his father and brother, by walking at a normal pace, awaiting an opportunity to complete the crossing. There is the evidence of the police officer and two other witnesses of plaintiff establishing the artificial lighting at the site of the accident as good; there were three street lights at or near the point where plaintiff crossed; the road was level for at least five blocks north of the place where plaintiff was standing; the defendant had his headlights lit and admitted being able to see at least 20 to 25 feet ahead; nonetheless defendant stated that he did not see plaintiff until he struck him. Upon these facts the jury was justified in finding that defendant negligently failed to keep a proper lookout, as charged. There is a conflict in the evidence as to the rate of speed at which defendant was proceeding along the drive, in excess of 30 miles an hour, the posted speed rate at that point; but it was within the province of the jury to determine this fact. The principal charge of negligence is that defendant drove and operated his car over the center line

and on the lefthand side of the roadway just before reaching the position where plaintiff stood, and then swerved over to the right just before the impact. Plaintiff's father was standing farthest to the north, the older boy next to him, and plaintiff to the south on the center line, abreast, at the time plaintiff was hit. As previously stated, the two boys were holding hands. Bryant, Sr., testified that defendant's car swerved over the center line into the north side of the lane and then back into his lane, brushed the blanket carried by the father, and clipped the leg of the older boy, and that the headlight of the car struck plaintiff in the face while he was standing on the center line, throwing or carrying him a considerable distance beyond the point of impact. The left headlight was found to be broken after the accident. From these facts it would appear obvious that the left wheel of defendant's car must have been over the line at the time its headlight struck plaintiff; and from the sequence of events, namely, the brushing of Bryant, Sr., and the clipping of the older boy, defendant's car must have been approaching plaintiff at an angle.

In order to recover it was sufficient for plaintiff to prove any one of the several charges of the complaint. Defendant submitted eighteen instructions, all of which were given; they advised the jury of every theory of the defense, including the law as to crosswalks, the rule as to the care required of motorists

under the circumstances, and of the law requiring a pedestrian to yield the right of way to the motorist in the circumstances under which the accident occurred; and of course upon argument to the jury all these theories were fully presented. Moreover, defendant submitted special interrogatories as to each charge of the complaint and argued to the jury his understanding of the law and the facts involved. Under the circumstances we do not think it necessary to review the facts at greater length to substantiate the conclusion that the court properly denied defendant's motion to hold that there was no negligence on the part of defendant as a matter of law.

Among other points it is urged that the willful and wanton conduct of the father in luring the child into danger constituted a defense. There is no evidence of willful and wanton conduct; at best, Bryant, Sr., may have put plaintiff in a position of danger, constituting negligence, which however could not be imputed to a five-year old child. In the recent case of Romine v. City of Watseka, 341 Ill. App. 370, the court reaffirmed the rule that a child under seven years of age is incapable of such conduct as will constitute contributory negligence, and that when a child of such tender years is injured by the negligence of another, contributory negligence on the part of the parents cannot be imputed to the child to support the defense of contributory negligence so as to bar the minor's suit for injuries and damages. In an earlier case, Ohnesorge v. Chicago

City Ry. Co., 295 Ill. 424, the administrators brought suit for compensation for wrongful death of a minor occasioned by negligence on the part of the child's father. The court held against the plaintiffs on the ground that contributory negligence of a parent bars action by an administrator for the death of a child, but significantly pointed out that "it is the settled law of this State that in a suit by a child who is merely injured, to recover damages, the contributory negligence of the father will not defeat the action brought by the child," and underscored its concurrence with this statement of the law by adding that "this proposition must be conceded as sound law under the decisions of this court," citing Chicago City Ry. Co. v. Wilcox, 138 Ill. 370, Chicago City Ry. Co. v. Tuohy, 196 Ill. 410, Richardson v. Nelson, 221 Ill. 254, and Perryman v. Chicago City Ry. Co., 242 Ill. 269. See also Hallis v. Stover, 275 Ill. App. 44.

It is also urged that the court erred in not granting a new trial on the ground that the doctor was allowed to testify to improper evidence, that the court erred in giving certain instructions, and that the verdict was excessive. Dr. Firfer was called to attend plaintiff as soon as he was brought into the hospital. He spent five hours that morning with plaintiff, saw him every day thereafter for two weeks during his hospitalization, and on various occasions thereafter as needed. Dr. Firfer was frequently consulted by the boy's mother over the telephone, in which she described plaintiff's subjective

symptoms, and the physician was allowed to testify as to these traits of behavior and statements of plaintiff's mother. This was improper procedure, but the same information was placed in evidence by the mother of the child who testified as a visual observer of his behavior, as related to the physician.

Defendant assigns as error the giving of three specific instructions offered by plaintiff: instruction No. 6, which explained that negligence on the part of the father or older brother could not be imputed to plaintiff; to instruction No. 19, which stated that pedestrians, including children, have a right to the lawful use of highways, while drivers have a corresponding responsibility to take reasonable precautions to avoid hitting children so using the highways; and to instruction No. 21, which indicated the basis on which the jury should assess damages if it found for plaintiff. These instructions must, of course, be considered as part of a series; they contain correct statements of law and, when read with the other given instructions, were not prejudicial.

As to the nature and extent of the injuries, it appears that prior to the accident plaintiff was a normal happy boy in good health. When he was brought to the hospital the doctor noted that he was in profound shock. There were multiple injuries, especially around the head and left side of the body, with a large laceration of the forehead, and the flap of the scalp was pretty well torn

away; there was also a deep laceration below the boy's right eye on a badly lacerated face, and his lower lip was torn away from his lower jaw. Twenty-three sutures were used to approximate the skin surfaces; many sutures were used to fasten the lip to the lower jaw; and numerous blood vessels had to be tied off to prevent hemorrhage. In the hospital he ran a fever, and had headaches and attacks due to a brain concussion. Thereafter serious changes occurred; nocturnal enuresis developed, the child had nightmares, cried at the slightest provocation, became nervous and fidgety, and developed a twitch in his eye that has steadily grown worse over the years. Of course a remittitur cannot stand where the verdict is based on improper or prejudicial evidence, as defendant contends. In Lauth v. Chicago Union Traction Co., 244 Ill. 244, it was pointed out that the doctor had committed errors as to very substantial facts, and that the evidence was prejudicially improper. In the instant case there is no controverted medical opinion, and we think the remittitur of 50 per cent--the verdict was reduced to $15,000.00 from $30,000.00--cures the error of permitting the doctor to testify to certain telephone conversations as to the child's behavior.

The case was fairly tried, the judgment is not excessive, and it is therefore affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P. J., and BURKE, J., CONCUR.

66 A

46109

SCOTTVILLE APPLE PRODUCTS CO., a corporation, Appellee, v. THE RAFELSON COMPANY, a corporation, and ABE RAFELSON, Defendants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO
On Appeal of ABE RAFELSON, Appellant.	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In October 1950 plaintiff, which maintained a cold storage warehouse at Scottville, Michigan, contracted with the Rafelson Company, a corporation, and Abe Rafelson, defendants, to store apples for them in its plant, and received some 6736 bushels of apples. The deliveries in storage were made on several days during the last week in October and on November 4, 1950. After the available space was filled, Rafelson asked for more space and was told that the rooms were filled to capacity. He thereupon suggested that the gangways should be used, and 350 additional bushels were placed in storage in the gangways in each room. A difference arose between the parties as to the balance due plaintiff for the use of crates, etc. On trial it was agreed by oral stipulation that this balance was $110.00, and judgment was entered in plaintiff's favor in that amount against the Rafelson Company. Subsequently, on petition of Abe Rafelson and by oral agreement between

counsel, an order was entered that all prior orders be amended to include Abe Rafelson, and he appeals from the judgment for $110.00 against him, as well as from the adverse judgment on his counterclaim for $8244.85, based upon the deterioration of some of the apples due to plaintiff's alleged negligence.

From the evidence adduced upon the hearing it appears that the basement portion of plaintiff's plant was 80 by 120 feet in dimension. Half of the floor was open space and was used for packing and general purposes; the other half was divided into two storage rooms, each measuring 20 by 60 feet. The temperature in the cold-storage rooms was maintained by the Freon system which utilized coils and blowers, automatically regulated; the cold air was distributed over the top of the room to the side walls, from whence the air flowed down the walls, returning back over the floor and rising through the stacks back to the refrigerating equipment. The temperature was automatically recorded. A stationary thermometer was hung at about eye level where the air returned on its round trip at a point usually the warmest spot in the room. There were also portable thermometers in the room. In March 1951 a gas filter connected with the refrigerator became out of order and so remained for not over four hours. A repairman came immediately upon notice to the manufacturer of the equipment in Grand Rapids and made the repair. While the filter was out of order the temperature did not rise in the room to over 46 degrees; the outside temperature then varied from 10 to 30 degreees.

The apples stored were made up of several varieties--Greenings, McIntosh, Delicious, Jonathans, Snows, and Golden Delicious. All these apples were in good condition when placed in cold storage.

On November 26, 1950, 268 bushels of Jonathans were taken out of the storage room. Abe Rafelson then inspected the stacks, and his witness Rosenberg, an employee, who was with him at the time, said that some apples were good but some seemed bad, but that nothing was done about it because they did not know how bad they were; it was just that the temperature of the room was "warm." On December 5, 10, and 15, 1950, 250 bushels of Greenings were taken out of storage, and Rafelson testified that he sold them for cider, that they were heated, and very ripe and brown. In the winter of 1950-1951 Rafelson went to Florida for about three weeks. The removal of the apples from cold storage recommenced on March 9, 1951 and ended on May 7, 1951. The final payment of the storage bill was made on June 15, 1950. A dispute arose between the parties as to an item claimed by plaintiff for the use of crates and bushel baskets. After all the apples were taken out of storage Rafelson wrote plaintiff a letter, dated June 15, 1951, portions of which are quoted herewith: "As per our conversation in your office yesterday I am herewith enclosing statement, and my check on what is due your company. I do realize all you have done for us while our apples were in your storage,

and appreciate everything that you have done. At the time I was starting to put the apples in your storage, I asked you if I could use your crates, and you replied yes. I then said to you that I would pay you something for the use of them. I believe I am being fair in paying you $50 for the use of these crates. In regards to the bushel baskets, our records show we used only 14 dozen. The price we have been paying for this type bushel baskets is $3.00 per dozen. We are paying you the $42.00 for the 14 dozen baskets we used. . . . In regards to the empty crates, we have checked our warehouse and will recheck our warehouse, and also with the farmers, and will try to find where the balance of the crates are that you claim are due you. Mr. Schultz I trust you will realize I am making every effort to clear up this situation that has arisen in our apple deal in your storage. I don't like to have any unfinished business after completing any deal. I will be in touch with you as soon as I can get some new information that will tend to show us what happened to the empty crates." Although defendant appealed from the judgment for $110.00, he does not question that item in his brief, since the loss was agreed upon on trial as $110.00, and judgment was entered in that amount.

Defendant's real grievance is the court's disallowance of his counterclaim for $8244.85. Upon trial he adduced proof tending to show that the value of the apples, if delivered to him in good condition, would have been $13,472.00;

that, as delivered, the value, because of the deterioration of some of the apples, was $5227.15; and that he sustained a loss in the amount of his counterclaim. The negligence charged was that the rooms were overcrowded--the stacks were too high and the crates too close to the wall--and the temperature too warm. However, he did not show what the temperature of the rooms was at any time, although there was a stationary thermometer kept in the warmest part of the room, as well as portable thermometers in other parts of the room; he never checked the thermometers. The correct temperature for cold storage of apples is slightly over 32 degrees.

As ground for reversal it is urged (1) that where goods are stored in a warehouse in Michigan and there damaged, the laws of the State of Michigan are to be invoked in an action for damages, and that, accordingly, it constituted error on the part of the trial court to decide the case on the basis of Illinois law; and (2) that where a prima facie case of negligence is made out by plaintiff, the burden is on defendant to show itself free from negligence. Plaintiff concedes that a Michigan contract made and executed in that state, when sued upon in Illinois, should be construed in accordance with Michigan law; but its counsel argue that the contract of storage is not involved in any such way as to invoke the law of Michigan, especially since no Michigan statute was referred to,

pleaded, relied upon or made an issue upon trial. Moreover, the burden of proof in warehouse or storage cases is the same in Illinois as in Michigan. See Thomas Canning Co. v. Pere Marquette R. Co., 211 Mich. 326, which states the rule of evidence in substantially the same language as used in Funkhauser v. Wagner, 62 Ill. 59.

Examining the record, we find that on trial defendant assumed the burden of proving the negligence charged, but on appeal he contends he made a prima facie case by showing that plaintiff took in good apples and delivered back bad ones, that his damage is to be determined by the difference between the value of the apples in the condition in which they were stored and the condition when received back from storage; and he argues that under Michigan law this is sufficient to warrant recovery.

Cases cited by defendant as to the rule in bailment involving perishable merchandise are readily distinguishable on the facts. In substantially all of them there was proof of conditions indicating improper care of the article while in storage which cast the burden of explanation on the bailee. Thus, in Purse v. Detroit Harbor Terminals, 266 Mich. 92, potatoes were stored, but not in cold storage, from October 22 to December 26, 1930, in a large room in which it was shown that there were uninsulated steam pipes in walls and on ceilings, with temperatures registering on thermometers from 40 to 60 degreees, and proof was made that these temperatures caused the

potatoes to sprout and deteriorate. The court there held that proof of such facts shifted the burden to defendant to show it had used ordinary care. In Schwartz v. Michigan Warehouse Co., 219 Mich. 401, tobacco was stored in a bonded warehouse and damaged by water dripping from a steam pipe. There, too, it was held that the burden shifted to the warehouse company to show that it was not negligent. And in Thomas Canning Co. v. Pere Marquette R. Co., 211 Mich. 326, beans, in good condition when loaded, were held on the track for nearly two months. When the beans were delivered, the car was found to be leaking and the produce in a damaged condition. Under the circumstances it was held that defendant had the burden of exonerating itself from blame.

In the present proceeding we have an inevitable change of condition of perishable goods over a period of time brought about by a natural deterioration. In such circumstances the burden of proof does not shift; there must appear some unusual circumstance or condition in connection with the storing or caring of the article to which a damaged condition can be attributed, such as appeared in the cases cited by defendant. Defendant here made no proof of any unusual circumstance or happening to which the deterioration of his apples while in storage could be attributed.

It is argued, and the evidence sustains the contention, that the year 1950 produced a bumper crop

of apples in Michigan, glutting the market, and, presumably, if defendant could have favorably marketed the apples he would have done so in the winter of 1950-1951; but he held the apples in storage beyond the limit of their storage endurance. There is also the circumstance that plaintiff helped defendant market the apples, found purchasers for him and purchased some of the apples for its own use--about 1400 bushels in all. Rafelson referred to this in his letter written at the time he made the final payment on his storage bill, saying "I do realize all you have done for us while our apples were in your storage, and appreciate everything that you have done." Defendant claims that the storage rooms were overcrowded; nevertheless, he had asked that the passageways be filled up with apples, knowing that the stacks were near the ceilings and the walls, and he continued to keep his apples in storage, knowing of these conditions. When the season of storage was over, Rafelson paid the balance of his storage bill in full, without complaint or claim of damage, and finally thanked plaintiff for his help in disposing of his merchandise.

Defendant's counterclaim appears to have been an afterthought, and we are satisfied that the trial judge who was called upon to decide the issues of negligence and plaintiff's alleged contribution thereto properly found adversely to defendant and entered judgment accordingly.

For the reasons indicated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

NIEMEYER, P. J. and BURKE, J., Concur.

67 A

46190

HERMAN KRUEGER, Appellee, v. JOSEPH LIND and KATHRYN LIND, Appellants.	APPEAL FROM COUNTY COURT COOK COUNTY

2 I.A.2d 52

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendants appeal from an adverse judgment for $1156.57, based upon a so-called time-and-material contract for remodeling defendants' home at 2954 Belmont avenue in Chicago.

The contract was entered into February 10, 1951 and provided that plaintiff, the contractor, was to be paid $3.85 per man-hour, and material at cost plus 10 per cent. In his complaint he alleged that the labor amounted to $1786.40, material $826.17, or a total of $2612.57; and that defendants paid $1456.00, leaving a balance of $1156.57, including interest and costs.

The dispute arises over the amount of time claimed by plaintiff to have been expended in doing the work. An exhibit offered in evidence and objected to by defendants was admitted by the court subject to cross-examination; it contained detailed entries of the time and services, the dates and hours, expended by plaintiff and his workman, and showed an aggregate of 464 working man-hours. Defendants cross-examined plaintiff as to the exhibit but thereafter made no further motion

to exclude it. As against this evidence, Mrs Lind, one of the defendants, testified that she had kept a record of the working time; that Henry Orth and his helper expended approximately 189 hours, while plaintiff worked only 144 hours, or a total of 333 hours. Plaintiff contends that her time sheet was prepared at one sitting, as indicated by the uniformity evidenced in the handwriting, the style, and the margins on the document, and that it was not a memorandum kept from day to day, as she insists. The court, after hearing all the evidence, resolved the issue against defendants, and we would not be justified in substituting our judgment upon this controverted question for that of the court who was in a position to judge of the credibility of the witnesses and determine the extent of plaintiff's services.

Defendants place considerable emphasis upon the fact that plaintiff, in his complaint and in one of the exhibits attached thereto, designated March 2, 1951 as the date when all work called for in the contract was completed. It appears, however, that in subsequent pleadings which became a part of the complaint, plaintiff alleged that March 17, 1951 was the last date that any work was done. Defendants had made a motion to strike the complaint, and a request to furnish a bill of particulars, which was filed and which detailed the number of hours for each day. That document became a part of plaintiff's complaint in the pleadings. We do not regard the

discrepancy complained of a bar to plaintiff's recovery because issue was joined on the complaint and the bill of particulars, and proof adduced pro and con as to the actual time spent in performing the work. Alton Railway and Illuminating Co. v. Foulds, 190 Ill. 367; O'Rourke v. Sproul, 147 Ill. App. 609. In the course of the hearing, plaintiff's daily time sheet and ledger sheet were before the court, both showing that plaintiff had performed work after March 2, 1951.

Other objections go to the credibility of plaintiff's testimony, and discrepancies such as frequently occur where a witness testifies to numerous items and service extending over a long period of time.

We have carefully examined the abstracts filed by both parties, and their briefs, and have reached the conclusion that the judgment should be affirmed; it is so ordered.

JUDGMENT AFFIRMED.

NIEMEYER, P.J., and BURKE, J., Concur.

68 K

46223

CALLIE INGRAM, Appellant,	)	
v.	)	APPEAL FROM MUNICIPAL
GEORGE GOODAR, Appellee,	)	COURT OF CHICAGO.
and	)	
OMEGA MISSIONARY BAPTIST CHURCH, a religious corporation, Intervenor-Appellee.	)	

2 I.A.2d 3

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, Callie Ingram, filed an action for replevin of the following articles of personal property: one pulpit, three pulpit chairs, one communion table, one bible and one hundred folding chairs. Defendant George Goodar answered that the property belonged to the Omega Missionary Baptist Church, a religious corporation, and prayed a return of the property. The intervening petition of the church alleged that it was entitled to the possession of the chattels replevied. Pursuant to hearing an order was entered finding that the right to possession of the property was in the defendant Goodar, and judgment was entered that he have and retain possession thereof. Subsequently an order was entered denying plaintiff's motion for a new trial. Plaintiff appeals from the judgment giving Goodar possession of the property and from the order denying plaintiff's motion for a new trial.

The plea by defendant of property in another put in issue only the plaintiff's right to the chattels. This

rule was first laid down in the early case of Anderson v. Talcott, 6 Ill. 365, as follows: "In this action, the defendant may plead in bar, property in himself or in a stranger, and if he succeed on the trial, he will be entitled to a return of the property, and to damages for the detention thereof. It is not necessary that he should connect himself with the title of the stranger, It is sufficient for him, that the right of property is not in the plaintiff. The plaintiff must recover on the strength of his title." Later, in Reynolds v. McCormick, 62 Ill. 412, the court held that under a plea of this kind the question raised is not whether the property is in defendant, but whether the right of property and to immediate possession thereof is in the plaintiff. The court again held that "under such a plea, the plaintiff must recover on the strength of his own title, and that the burden of proof is on him to establish his right. [Citing cases.]" See also Pease v. Ditto. 189 Ill. 456; Atkins v. Byrnes, 71 Ill. 326; Ballou v. Hushing, 46 Ill. App. 174; Constantine v. Foster, 57 Ill. 36; and McLeroth v. Magerstadt, 136 Ill. App. 361; these cases hold, under similar pleadings, that the only issuable fact is whether the right of property is in the plaintiff.

The sole point urged for reversal is that the judgment in favor of defendant was directly contrary to his sworn answer, and argues that there is an inconsistency between that answer averring that the goods and chattels replevied were the property of the church, and the judgment

in favor of defendant. There is no merit to this contention since a finding that defendant as against plaintiff was entitled to possession of the goods was in no way inconsistent with ownership of them by the church, as, for example, ownership in the church coincident with a special right of property such as right to possession in defendant.

The judgment for return of the property to defendant is proper and is therefore affirmed.

Judgment affirmed.

Niemeyer, P. J., and Burke, J., concur.

69 A

46349

WILLIAM J. HORVATH, Appellee,	INTERLOCUTORY APPEAL
v.	SUPERIOR COURT
FRANK J. FISHER, Appellant.	COOK COUNTY

12 I.A.2d 53

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On January 26, 1954, William J. Horvath filed a complaint in chancery against Frank J. Fisher alleging that from August 15, 1953 to December 31, 1953, he worked as a salaried employee in the manufacture of fiberglass boat hulls for the defendant, doing business as Frank Fisher Enterprises; that on September 2, 1953, he and the defendant entered into an oral partnership at will to engage in the business of manufacturing and selling sport cars with laminated fiberglass bodies; that under the agreement plaintiff was to furnish the use of molds or dies owned and developed by him without charge and to supervise the manufacturing process; that defendant was to furnish working space without charge and to furnish raw materials and labor until such time as the partnership could maintain itself out of net income; that defendant was to promote sales; that the profits were to be divided equally; that the parties entered into and upon the performance of their duties; that plaintiff faithfully performed all the duties devolving upon him under the agreement; and that he furnished a completed laminated

fiberglass body to the partnership and fabricated another in their place of business at 4635 South Harlem Avenue, Berwyn, Illinois.

The complaint further alleges that on or about October 6, 1953, defendant advanced to plaintiff the sum of $3000 for the payment thereof to the Oak Park National Bank, a creditor of plaintiff in that amount; that to evidence the "advance" plaintiff executed and delivered to defendant his note in that amount; that to secure the payment of the note plaintiff executed and delivered to defendant a bill of sale for all of the inventory then owned by the plaintiff which had been formerly owned by Owens-Horvath, Inc., consisting of one complete set of molds mounted on a channel iron frame to be used for the manufacture of fiberglass automobile bodies and one fiberglass automobile body, both of which were then being used in the conduct of the partnership business; that on or about December 7, 1953, defendant advanced to plaintiff $1000 for the payment thereof to one VanHatten Motor Sales, a creditor of plaintiff in that amount; that to evidence the "advance" plaintiff executed and delivered to defendant his note for $1000; that plaintiff tenders to the defendant the sum of $4000 and such interest as may be due thereon in full satisfaction of the indebtedness and for the purpose of securing a return of the chattels pledged as security; that during the partnership and to and including December 31, 1953, defendant failed and refused to consult with

plaintiff about the handling and development of the partnership business and conducted that business without regard to the advice and wishes of plaintiff; and that on December 31, 1953, plaintiff withdrew from active participation in the partnership and "dissolved the same."

Continuing, plaintiff avers that the partnership property consists of two laminated fiberglass automobile sport bodies each mounted on an automobile chassis and such additional laminated fiberglass sport bodies as have been constructed by the defendant since December 31, 1953; that defendant has caused certain openings to be made in the fiberglass automobile body originally owned by plaintiff and contributed by plaintiff to said partnership in such an unskillful manner as to greatly depreciate or destroy the value thereof; that the defendant intends to convert the partnership assets to his own use for the promotion of sales for his own benefit; that he intends to exhibit one of the fiberglass auto bodies at the Boat Show to be held in Chicago commencing February 5, 1954, as the production of Frank Fisher Enterprises; that unless restrained from so doing by the order of the court such conduct will irreparably damage plaintiff; that since December 31, 1953, defemdant has incurred and is incurring obligations chargeable to the partnership; and that the appointment of a receiver with full power to collect and retain the partnership assets during the pendency of

the proceeding is necessary for the protection of plaintiff's interests. Plaintiff's prayer asks that the partnership be adjudged dissolved, that a receiver of the property rights and assets of the partnership be appointed to collect and retain such assets during the pendency of the suit, that after the payment out of the assets of all just debts and charges against the partnership and the costs and disbursements of the suit the residue be divided between the parties according to their rights, that a temporary injunction be granted restraining the defendant from using or disposing of the set of molds used for the manufacture of fiberglass automobile bodies and the two fiberglass automobile bodies in his possession or control, and from displaying the fiberglass automobile bodies at the Boat Show or at any other place and from manufacturing any fiberglass automobile bodies from the molds and from manufacturing any fiberglass automobile bodies by using either of the fiberglass automobile bodies in his possession or control as a model or pattern therefor, and that the bill of sale be construed to be a pledge of the chattels described therein as security for the indebtedness of $4000 owing by plaintiff and that upon repayment of the loan there be a reconveyance of the chattels to the plaintiff.

On January 28, 1954, due notice having been given and the court having heard the arguments of counsel, the chancellor granted an interlocutory injunction restraining

the defendant from using or disposing of the set of molds and the two fiberglass automobiles, from displaying the automobile at the Boat Show or at any other place, and from manufacturing any fiberglass automobile bodies from the molds or from the automobiles as models therefor. Defendant appeals.

As there was no answer at the time the injunctional order was entered we shall consider the case upon the averments of ultimate fact in the complaint. From August 15, 1953 to December 31, 1953, plaintiff worked as a salaried employee in the manufacture of fiberglass boat hulls for the defendant. On September 2, 1953, the parties became partners at will to engage in the business of manufacturing and selling sport cars with laminated fiberglass bodies. Plaintiff was to furnish the use of molds or dies owned and developed by him and to supervise the manufacturing process, and defendant was to furnish working space, raw materials and labor and promote sales. The profits were to be divided equally. The parties entered into the performance of their duties and plaintiff carried out all of his duties. He furnished a completed laminated fiberglass body to the partnership and fabricated another in the place of business of the partnership in Berwyn. On or about October 6, 1953, the defendant loaned to plaintiff $3000 so the latter could pay its indebtedness in that amount to a bank. To evidence the indebtedness plaintiff executed a note for $3000 and to

secure payment of the note executed and delivered to the defendant a bill of sale for one complete set of molds mounted on a channel iron frame to be used for the manufacture of fiberglass automobile bodies and one fiberglass automobile body, both of which were then being used in the partnership business. On December 7, 1953, defendant advanced to plaintiff the sum of $1000 for payment to another creditor of plaintiff and plaintiff executed and delivered to defendant its note evidencing the indebtedness. Plaintiff tenders the $4000 and interest. During the partnership defendant failed and refused to consult with the plaintiff about the handling and development of the partnership business without regard to the advice and wishes of the plaintiff. On December 31, 1953, plaintiff withdrew from active participation in the partnership and "dissolved the same."

Plaintiff asserts that the two fiberglass bodies were the only assets of the partnership. One of these bodies was furnished to the partnership and the other was fabricated by the partnership. One of the fiberglass automobile bodies and a complete set of molds are the chattels mentioned in the bill of sale. Under the agreement the plaintiff was to furnish "the use of the molds" developed by him. However, plaintiff alleges that the two fiberglass car bodies were the only assets of the partnership. The complaint does not say that the defendant threatens to conceal, sell or otherwise dispose of the partnership assets.

There are no ultimate facts alleged showing that plaintiff will suffer irreparable injury. The complaint does not state in what manner the exhibition of the automobile body would result in injury to him. He does not state any allegation that the defendant is insolvent or unable to pay a judgment for any damages suffered. He does not allege that the mold was unique or that its sale would result in any special injury or damage to him.

A court should exercise caution in issuing a preliminary injunction. In our opinion the allegations of the complaint are insufficient to sustain the injunction. Therefore, the order of the Superior Court of Cook County of January 28, 1954, is reversed.

ORDER REVERSED.

NIEMEYER, P. J., and FRIEND, J., Concur.

K 38

46199

GOZIE LEDBETTER, Beneficiary of GEORGE WASHINGTON, deceased, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
MAMMOTH LIFE AND ACCIDENT INSURANCE COMPANY, a Corporation, Appellant.	)	OF CHICAGO.

2 I.A.2d 1-6

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued as beneficiary in a "Non-participating Industrial Policy" of insurance issued by defendant. The policy was for $750. A trial without a jury resulted in a finding and judgment in favor of plaintiff for $1,000, from which judgment defendant appeals.

The policy in question contained the provision: "This policy shall take effect on the date of issue, provided the insured is alive and in sound health, and at least one premium paid upon delivery of the policy." The policy was issued April 23, 1951. The insured died October 4, 1951.

Defendant in its answer rested its defense upon the alleged false answers made by the deceased in his application for the insurance. It alleged that deceased falsely stated in the application that he was in sound health, and that he had not received any institutional, hospital, medical or surgical treatment or attention within the last two years. The answer further alleged that the applicant knew he was not in sound health at the time of the application

and had been suffering with chronic myocarditis for at least one year preceding the issuance of said membership certificate.

The only evidence introduced by defendant to support its defense was that of a medical expert who, in answer to a hypothetical question, testified that in his opinion, based upon a reasonable medical certainty, the insured was not in good health six months prior to the time of his death, and that the insured could not have suffered with chronic myocarditis and not know it six months prior to his death.

To rebut this testimony a medical expert for plaintiff testified that in his opinion deceased could have been in sound health on April 23, 1951, and could have developed chronic myocarditis in less than six months. Another witness for plaintiff testified that the insured worked hard every day as a butcher up to within two weeks of his death.

Section 154, par. 766, Ch. 73, Ill. Rev. Stat. 1953, provides:

> " * * * No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company."

In construing this section, this court has said in Hamberg v. Mutual Life Ins. Co., 322 Ill. App. 138, 143:

> "The section places representations and warranties on the same footing and provides, alternatively, that before a misrepresentation or false warranty shall defeat or avoid a policy (a) it shall have been made with actual intent to deceive, or (b) it shall materially affect the acceptance of the risk, or (c) it shall materially affect the hazard assumed by the company." (Citing cases.)

and had been suffering with chronic myocarditis for at [illegible] one year preceding the issuance of said certificate.

The only evidence introduced by defendant to sustain its defense was that of a medical [illegible], who, in answer to a hypothetical question, testified that in his opinion, based upon a reasonable medical certainty, the insured was not in good health six months prior to the time of his death, and that the insured would not have [illegible] with a heart [illegible] and not know it six months prior to his death.

In [illegible] this [illegible], a medical expert [illegible] plaintiff testified that in his opinion a person could be [illegible] found [illegible] April 29, 1951, [illegible] developed chronic myocarditis in less than six months. [illegible] three or four [illegible] the [illegible] have [illegible] two weeks [illegible] death.

[illegible] Ill. App. [illegible] N.E. 2d [illegible]

[illegible]

" * * * [illegible] much [illegible] [illegible] [illegible]

[illegible]

[illegible]

The burden was upon defendant to prove that decedent knowingly made false answers to the questions in the application, as alleged in defendant's answer. The medical opinion of defendant's witness falls so far short of meeting this burden of proof that the trial court was justified in finding that defendant had not met this burden of proof.

The judgment includes attorney's fees authorized by statute (Ch. 73, §155, par. 767, Ill. Rev. Stat. 1953). That section authorized the court to allow reasonable attorney's fees, not to exceed $500, where it appears that the insurance company's refusal to pay is vexatious and without reasonable cause. Where, as here, the defendant failed to establish its defense, the court was justified in finding under the statute that the refusal to pay was vexatious and unreasonable.

The judgment is correct and is affirmed.

AFFIRMED.

KILEY AND LEWE, JJ., CONCUR.

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

FEBRUARY TERM, A.D.1954

General No.9903 Agenda No.3

Raymond O. Sawyer,

Plaintiff-Appellee,

vs.

Jerome J. Sholem et al.,

Defendants.

# # # #

J. J. Sholem Stores Company, an Illinois Corporation,

Appellant.

Appeal from the Circuit Court of Champaign County

2 IA 137

Per Curiam:

On February 7, 1953, the defendant-appellant, J.J. Sholem Stores Company, an Illinois Corporation, filed in the Circuit Court of Champaign County its appeal bond and notice of appeal from the judgment of that Court against it and in favor of plaintiff-appellee Raymond O. Sawyer, entered February 4, 1953, in his forcible entry and detainer action against that corporation and Jerome J. Sholem, individually.

Plaintiff's motion before this Court to dismiss the appeal on the ground that it was not perfected within the time prescribed by law has been ordered taken with the case and must be first considered.

By its nature the motion necessitates a somewhat detailed description of the sequence of events occurring in the trial court at the conclusion of the hearing which was had in the Circuit Court of Champaign County in the Sixth Judicial District before Circuit Judge Robert F. Cotton, one of the judges of the Fifth Judicial District, sitting without a jury.

After hearing the evidence and considering the arguments and written briefs of counsel, Judge Cotton filed his memorandum opinion in the trial court on January 23, 1953, in which he concluded "that the purported lease under which defendants claim possession is invalid". After directing the attention of counsel to Article 17 of the Canons of Professional Ethics of the Illinois State Bar Association, Judge Cotton closed his opinion as follows:

> "Let Judge Charles E. Keller enter the following order: The Court finds defendants guilty of withholding from the plaintiff (the premises in question). Ordered that the plaintiff do have restitution from the defendants of (the premises in question) and that a writ of restitution do issue therefor..."

Plaintiff's short record recites that "on the same day" there "was entered of record" in the trial court, "...present Honorable Charles E. Keller," its presiding judge, the following:

> "At the direction of Judge Robert F. Cotton the following order is entered herein: Now come the parties hereto...and the Court having heard the evidence...and the arguments of counsel...finds the defendants guilty of withholding from the plaintiff the premises described in the complaint and it is thereupon ordered...that the plaintiff...do have restitution from the defendants, Jerome J. Sholem and J. J. Sholem Stores Company...and that a writ of restitution issue therefor..."

A writ of restitution, dated January 30, 1953, and issued in conformity with the foregoing, was "returned unserved by direction of the Clerk of the Court" and filed February 7, 1953.

On February 4, 1953, a judgment order signed by Judge Cotton was filed in the trial court which recited the coming on of the cause for hearing "on the motion of the defendant to quash the writ of restitution heretofore issued out of the office of the Clerk of this Court". After overruling plaintiff's objections thereto, the order quashed the writ and found, in substance, that the defendant, J. J. Sholem Stores Company, had been guilty of withholding the premises in question from plaintiff and that a writ of restitution should be issued against it, but that the defendant, Jerome J. Sholem "(was) not guilty of withholding from the plaintiff". It was "therefore ordered, adjudged and decreed that the plaintiff...have and recover the possession of the... premises...from the defendant, J. J. Sholem Stores Company...and that the said complaint be dismissed as to the defendant, Jerome J. Sholem". In addition, the judgment order fixed the amount of bond "in the event of an appeal". The short record recites that there was "entered of record in the trial court on the same day" an order which is in substance identical with the foregoing judgment order except as hereinafter noted.

It is clear from the record that plaintiff objected to the motion to quash the writ of restitution on the ground the Court was without jurisdiction so to do and that he further entered "his ob-

jection to the modification of the judgment as heretofore entered". At the same time and for the same reason plaintiff objected to defendants' motion to fix the appeal bond.

As ground for dismissal, plaintiff urges that, in the foregoing circumstances, judgment was rendered on January 23, 1953, within the meaning of Ill. Rev. Stat. 1951, Ch. 57, Par. 19, which provides that an appeal from a forcible entry and detainer action shall be taken "in the same way as appeals are taken... in other cases" provided the party aggrieved "files notice of appeal and bond within five (5) days from the rendition of the judgment...", and that accordingly, on February 4, 1953, eleven days after rendition of judgment, the trial court was without jurisdiction to consider the motion to quash the writ of restitution theretofore issued, or to modify in any way its earlier judgment and thereby extend, by indirection, the time for filing notice of appeal and bond.

In the opinion of this Court it is abundantly clear upon the authority of the recent decision in Freeport Motor Casualty Co. v. Tharp, 406 Ill. 295, that, as plaintiff contends, judgment was "rendered" in this case on January 23, 1953, and "entered" on the same date as evidenced by the entry in the trial court record. Particularly pertinent here is the Supreme Court's reliance on its earlier decision in People v. Petit, 266 Ill. 628. In that case, after describing certain abbreviated notations made in the minute book of the trial judge's minute clerk, in the clerk's docket, in

the judgment docket, and on the wrapper of the files, the Court commented as follows:

> "(These) memoranda...did not constitute the record of a judgment. They are no part of the record of the Court. The rendition of a judgment is the act of the Court and can ordinarily be proved only by the record. The judgment exists, however, from the time the Court acts, even though the entry of the judgment may not have been formally written by the clerk...
>
> " If (the notations described) constitute a sufficient memorandum from which the clerk could formally write out the judgment pronounced by the Court, or even without such entries if the judgment was actually rendered, the clerk was then authorized to issue an execution. It was his duty to enter of record the judgment so rendered..."
> (See also People v. Bristow, 391 Ill. 101 at 114).

From the foregoing it is evident that the trial court record, written up by the clerk of court, is to be regarded as a written memorial of judgments "rendered" or pronounced by the Court and as such is primary, conclusive evidence thereof.

As in the Tharp Case the record on appeal before this Court certifies, in the usual form, that the above quoted entry, "on... one of the regular judicial days of the Term of Court last aforesaid... was had and entered of record therein..." The "record" referred to in this recitation is clearly the trial court record, the official chronicle of its acts, as appears to have been taken for granted in the Tharp Case. There is no basis whatever in the record before this Court for defendant's suggestion that the matter quoted was but an entry in the judge's docket as distinguished from the court record. Cases cited by defendant to support the proposi-

the judgment docket, and on [illegible]

commented as follows:

"(Those) [illegible]
record of a [illegible]
record of the [illegible]
in the act [illegible]
opened only [illegible]
[illegible] from [illegible]
the [illegible]
[illegible] ...

"[illegible]
of the [illegible]
write out [illegible]
even [illegible]
[illegible]
exactly [illegible]
[illegible] ...
(see also [illegible]

From [illegible]
ten [illegible]
of [illegible]
[illegible]
[illegible]
[illegible]
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[illegible] ...
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the [illegible]
for [illegible]
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[illegible]
[illegible]
the [illegible]

tion that a docket entry made by a trial court does not constitute a final appealable judgment are therefore wholly inapplicable here. It has not been suggested that the record entry in question is in any respect inaccurate, and it accordingly stands as proof of the trial court's judgment and its rendition without reference to the memorandum opinion of the trial judge filed on the same date.

As authority for the conclusion of his argument, that an appeal from judgment in forcible entry and detainer must be dismissed unless notice of appeal and appeal bond are filed within five days from rendition of judgment, plaintiff relies on the interpretation of the Act announced in Chicago Housing Authority v. Frank, 335 Ill. App. 456, Atlas Finishing Co. v. Anderson, 336 Ill. App. 167, and Gholston v. Terrell, 292 Ill. App. 192, which appear to so hold. In particular it is stated in these decisions, as has frequently been held, that the timely filing of notice of appeal and bond as prescribed in the statute is "jurisdictional". By this it is apparently meant that an appellate court is not authorized by law to consider the appeal unless notice and bond are filed within five days from rendition of judgment. It is apparently plaintiff's position that, as a corollary of this rule, the trial court is without authority to proceed further with the cause after the five-day period has elapsed even though an appeal is not perfected.

The latter proposition, however, is not well founded. In Kjellberg v. Muno, 340 Ill. App. 133, relied on by defendant, default judgments for possession were entered against one of the de-

fendants in a forcible entry and detainer action, and the defaulted party took no action until some thirteen days thereafter when he moved to vacate the judgments on the ground he had had no notice of the hearing. The trial court entered an order overruling the motion to vacate, and the defendant appealed from that order and from the judgments for possession against him. The First District Appellate Court, without discussion of the interrelated appeal provisions of the Forcible Entry and Detainer Act, the Civil Practice Act and the Judgment Act, held:

> "It is manifest that (the defendant) had a right to appeal from the order...overruling his motion to vacate. The fact that he mentioned (in his notice of appeal) the judgment orders may be regarded as surplusage."

From this holding it appears rather clearly to have been the opinion of the Court that although the defendant was entitled to appeal the order overruling his motion to vacate the judgments, he could not have had the judgments reviewed on their merits because timely appeal therefrom had not been perfected as prescribed by the Forcible Entry and Detainer statute.

In Atlas Finishing Co. v. Anderson, supra, the First District Court had earlier considered in detail the applicability of the provisions of the Civil Practice Act, (Ill. Rev. Stat. 1951, Ch. 110, Par. 192; Ch. 110, Par. 174, Subsec. 7.) and of the Judgment Act, (Ill. Rev. Stat. 1951, Ch. 77, Par. 83, Sec. 2.) in appeals from forcible entry and detainer proceedings. The majority of the Court concluded, against an extensively documented dissent,

that the appeal provisions of the Forcible Entry and Detainer Act were controlling in the circumstances of that case and that the filing of a motion for a new trial by the defendant did not operate, by virtue of either the Civil Practice Act or the Judgment Act, to stay the time for appeal from the judgment for possession. Subsequently, however, in Weinberg v. Warren, 340 Ill. App. 365, the First District Court held that a motion for new trial and in arrest of judgment by defendant stayed the time for filing notice of appeal which began to run from the date the motion was disposed of. (See also Goldblatt v. Perlman, 338 Ill. App. 654).

The Second District Appellate Court has held, on the other hand, (Kruse v. Ballsmith, 332 Ill. App. 301) that "the time for filing notice of appeal expired five days after...the date of the judgment, or at the latest, five days after (the filing and denial of defendant's motion to vacate the judgment)". It thus seems apparent that although the law as announced by the Appellate Courts of this State as to the effect of a motion for a new trial, or in arrest of, or to vacate a judgment in a forcible entry and detainer proceeding is in a state of some uncertainty, this appeal cannot properly be dismissed on the ground that the trial court lost jurisdiction of the cause when an appeal was not perfected within five days from rendition of judgment. In the opinion of this Court, it is unnecessary, however, to attempt to reconcile the foregoing decisions because the instant case is to be distinguished on its facts in essential respects.

that the appeal provisions of the [illegible]
were controlling in the circumstances [illegible]
filing of a motion for a new trial [illegible]
by virtue of either the [illegible]
stay the time for appeal from the [illegible]
quently, however, in [illegible] v. [illegible]
First District court [illegible]
of judgment by [illegible]
peal under [illegible]
(see also [illegible] v. [illegible])
The second [illegible]
land. ([illegible] v. [illegible])
[illegible] also of special [illegible]
judgment, or as the [illegible]
of defendant's [illegible]
apparent [illegible]
of this date [illegible]
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sions because [illegible]
in accordance [illegible]

- [illegible] -

The only motion in this case which might operate to stay the time for appeal is the motion to quash the writ of restitution which issued pursuant to the judgment of the trial court against both defendants rendered and entered January 23, 1953. The only information concerning the nature of this motion imparted by either the short record or the record on appeal in this Court is contained in the formal judgment order filed February 4, 1953, and in the order of the trial court entered on the same date in the trial court record. As indicated above both recite merely the coming on of the cause for hearing on the motion to quash the writ of restitution theretofore entered. There is no indication whether the motion was oral or written nor of the date when it was filed or made. The grounds asserted for allowance of the motion appear only by implication in the order which found that J. J. Sholem had not been guilty of withholding possession of the premises from plaintiff, from which it would appear that the motion directed the trial court's attention to a failure of proof as to him. While the motion is not styled as one to vacate the trial court's prior judgment it seems apparent that the writ could not have been quashed, as it was, without partial vacation and amendment of that judgment first being made. In determining the effect of the motion upon the time to appeal, the motion may therefore be considered in essence, if not in form, as one to vacate the judgment, as in Kjellberg v. Muno, supra. That decision is authority for the proposition that, had the motion been denied in this case, the moving party would have been entitled

to appeal from the order denying the motion but not from the judgment of the trial court on the merits.

In this case, however, the motion was in fact allowed, and, on the record, there is some confusion as to who the moving party was. The judgment order quashing the writ recites the hearing "on the motion of the defendant" without specifying which defendant, while the trial court record recites that "the defendants now enter their motion" to quash the writ. Whether the motion was in fact made by one or both defendants is however, in the opinion of this Court, immaterial. So far as appears, relief was sought only on behalf of the personal defendant and the motion by its nature necessitated recognition of the corporate defendant as an entity distinct from the personal defendant. Perforce, the record fails to show that the corporate defendant opposed the motion and there is no suggestion whatever upon argument that its allowance operated to the prejudice or detriment of the corporate defendant in any manner whatever. It has not on this appeal sought to have reviewed the trial court's action on the motion nor has it suggested that it has any right to do so. To the contrary, the notice of appeal states that the corporate defendant appeals from the trial court's judgment "entered on the 4th day of February...1953, (ordering) that plaintiff have restitution from the defendant J. J. Sholem Stores Company, an Illinois corporation..."

Analytically, that judgment determined two issues, one in plaintiff's favor against the corporate defendant, and the other

to appeal from the order [illegible] the judgment of the trial court [illegible].

In this case, however, the motion was [illegible] on the record, there is no [illegible] was. The judgment order [illegible] the motion of the defendant" [illegible] while the trial court in [illegible] their motion" [illegible] made by one or both [illegible] court, inadvertent. [illegible] behalf of the [illegible] consideration of the [illegible] other from the [illegible] no suggestion whatever [illegible] to the propriety or [illegible] error. However, [illegible] the trial court's [illegible] it was [illegible] to do. [illegible] whether the [illegible] judgment [illegible] that matrimony [illegible] [illegible]

Analytically, the [illegible] plaintiff's favor [illegible]

in favor of the personal defendant and against the plaintiff. In finding for the personal defendant it first vacated and then amended or modified the prior judgment to the detriment or prejudice of the plaintiff, but not of the corporate defendant. However, that part of the judgment which has been appealed, finding the issues and ordering relief against the corporate defendant must be regarded in essence as surplusage because it merely reaffirmed the prior judgment which became effective when rendered and continued in effect thereafter.

The purpose of the Act "is to afford a summary remedy in which the rights of the parties may be speedily determined, and a delayed appeal would be inconsistent therewith." (Kruse v. Ballsmith, 332 Ill. App. 301). Accordingly, in the opinion of this Court, there is neither reason in principle nor under the decisions to hold that the time for appealing from the judgment of January 23, did not commence to run, in this case, upon rendition nor to hold that vacation and modification of a part of that judgment as to the personal defendant stayed the running of the time, as prescribed in the Act, for the corporate defendant to perfect its appeal. As notice of appeal and bond were not filed by the defendant within that time its appeal must be dismissed.

The motion to dismiss the appeal is allowed and the appeal dismissed.

Appeal dismissed.

81

46179

KATHARINE HEROLD, Administrator of the Estate of Walter Herold, Deceased, Appellee, v. RALPH E. LIND, Appellant.	APPEAL FROM THE SUPERIOR COURT OF COOK COUNTY.

2 I.A.2d 138

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a death action [Chap. 70, Par. 1-2, Ill. Rev. Stat. (1953)] arising from an automobile collision in Evanston, Illinois. The first trial resulted in a not guilty verdict in the Municipal Court of Evanston. A new trial was ordered for plaintiff and defendant sought to appeal from the order. This Court denied leave to appeal. The second trial was in the Superior Court of Cook County, under stipulation of the parties. Verdict and judgment were for plaintiff for $10,000. Defendant has appealed.

Plaintiff's complaint charged negligence in count I and wanton and wilful misconduct in count II. The questions on appeal are whether there was a lack of any evidence of wanton and wilful misconduct requiring judgment for defendant notwithstanding the verdict for plaintiff; whether plaintiff's decedent was guilty of negligence as a matter of law; whether the verdict is against the manifest weight of the evidence; and whether there was prejudicial error committed in instructing the jury.

We apply the familiar rule to the first question and take as true the testimony most favorable to plaintiff: The accident occurred about 4:00 A.M. in the intersection of Lake Street and Ridge Avenue, Evanston. Plaintiff's decedent was driving east on Lake Street and defendant was driving north on Ridge Avenue. Defendant was traveling 75 miles per hour for several blocks, in which the speed limit was 30 miles per hour, before the accident and had twice gone into the southbound lane to pass automobiles south of Dempster Avenue. At Dempster Avenue, 1100 feet south of Lake Street, he went through a red light. When defendant was more than 500 feet south of Lake Street plaintiff emerged into the intersection going 5 or 10 miles an hour from the west line of Ridge Avenue where he had stopped. Defendant did not slacken speed despite an amber flicker light at Lake Street, nor did he swerve into the southbound lane to avoid the collision which took place in the southeast quarter of the intersection. The damage to plaintiff's car was at the side, the defendant's at the front.

That evidence tends to prove that defendant was conscious of his conduct and conscious from his knowledge of surrounding circumstances and conditions that his conduct would probably result in injury; and that his conduct displayed an intentional disregard of a known duty necessary to the safety of others and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences. Bartolucci v. Falleti, 382 Ill. 168.

This was not a case of merely exceeding a speed limit, such as the statement in Ruwisch v. Knoebel, 233 Ill. App. 526 refers to. And the facts here are significantly different from those in Aldridge v. Morris, 337 Ill. App. 369, 374, where the court said that ". . . mere speed is not of itself proof of wilful and wanton misconduct. . .", though holding the question was for the jury. A failure to comply with a speed law does not necessarily establish wilful and wanton conduct, but the rate of speed and attending circumstances must also be taken into consideration. Bartolucci v. Falleti. See also this Court's statement of the rule in Signa v. Alluri, 351 Ill. App. 11, 15.

It follows from our first conclusion that the question of contributory negligence need not be considered.

We see no merit whatever in the contention that the verdict is against the manifest weight of evidence.

We see no substance in the contention that there was prejudicial error in the giving of Instruction 10. It did not refer the jury to the charges in the complaint, as in the cases cited by defendant. It merely stated a rule with respect to wilful and wanton misconduct and then stated that under the second count, the question of decedent's negligence was immaterial since contributory negligence was not a defense to a charge of wilfulness and wantonness. There is no merit in the claim of error in the giving of Instruction 11. The language complained of is identical with that in the rule announced in Schneiderman v. Interstate Transit Lines, 394 Ill. 569, 583.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

FEINBERG, P.J. AND LEWE, J. CONCUR.

46274

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. LOUIE COSPER, Plaintiff in Error.	ERROR TO THE MUNICIPAL COURT OF CHICAGO, FIRST DISTRICT.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is the second appeal of this cause. Plaintiff in error Louie Cosper, hereinafter called the defendant, was charged with contributing to the delinquency of two girls, Yvonne Kafesjian and Joanne Maier, each aged ten years, in two separate informations. In a trial before the court without a jury defendant was found guilty on each charge. Defendant appealed to the Supreme Court, where the cause was transferred to this court on the ground that no constitutional question was presented. (People v. Cosper, 405 Ill. 543.) This court reversed the Kafesjian case for the reason that the information was defective and in the Maier case we reversed the judgment and remanded the cause for a new trial. (General number 45222; 99 N. E. 2d 837.) Retrial of the case involving Joanne Maier resulted in the jury's finding the defendant guilty and fixing his punishment at imprisonment in the House of Correction for a term of ninety days. The cause comes here again on writ of error prosecuted by defendant.

Joanne Maier testified that at about 7:00 a.m. on September 1, 1948 she came to the defendant's house for the

purpose of playing with his dog. At that time he was dressed in his underwear and his private parts were exposed. Soon after, he placed his arm on Joanne's shoulder, kissed her, and placed her hand on his private parts. Then he asked her to remain while he ate breakfast. During this period defendant was seated at the kitchen table, still indecently exposed. Shortly before Joanne left the defendant's premises he told her not to tell anyone what had occurred.

Joanne's mother, Ann Maier, testified that defendant admitted in her presence before the State's Attorney that he had been visited by Joanne on the morning of September 1; that he was dressed in his underwear; and that he had kissed Joanne. At the trial defendant denied that he saw Joanne on the morning of September 1 and the commission of the indecent acts. A number of character witnesses testified in behalf of defendant.

Defendant challenges the validity of the judgment on constitutional grounds. Our Supreme Court has repeatedly held that all cases in which constitutional questions are raised must be taken directly to the Supreme Court for review. If such a case is taken to the Appellate Court and other errors are assigned of which that court has jurisdiction, the defendant is held to have waived the constitutional question. (People v. Rosenthal, 370 Ill. 244; People v. Terrill, 362 Ill. 61.)

Defendant insists that notwithstanding the rule announced in the cases last cited the members of this court, by virtue of their oaths of office to support the Federal

Constitution, particularly Article VI, are bound to consider the questions raised. In support of this position defendant relies on language appearing in Abelman v. Booth, 21 How. 506,524, and People v. Brand, 415 Ill. 329. We find nothing in these cases to support defendant's position.

Defendant contends that the information is void because it fails to show specific violation of the statute. We think that the allegation in the information charging defendant with exposing his private parts in the presence of Joanne sufficiently apprised the defendant.

Defendant also complains of People's given instructions 1, 2 and 3. We have examined these instructions and in our view they state substantially the law governing this cause.

Joanne Maier detailed the acts committed by the defendant, at both trials, with the same results. She was subjected to prolonged cross-examination. Her testimony was positive and convincing. Even though she was contradicted by the defendant we think the evidence warranted the finding of the jury. See People v. Wilson, 1 Ill. 2d, 178.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

FEINBERG, P.J. AND KILEY, J., CONCUR.

2 Ill. App 2d
Part 2

Abstract

General No. 10716 Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT,

FEBRUARY TERM, A.D. 1954

IMOGEAN L. WOOD, Plaintiff-Appellee, vs. ROBERT E. RECK, Defendant-Appellant.	Appeal from the City Court of Aurora.

2 I.A. 169

Dove, J.

Imogean L. Wood, instituted this suit in the City Court of Aurora, against Robert E. Reck, to recover damages for personal injuries sustained by her in an automobile collision between the car she was driving and the car of the defendant. The issues made by the pleadings were submitted to a jury, which returned a verdict in favor of the plaintiff for $15,000.00. To reverse the judgment rendered on the verdict defendant appeals.

It is contended by counsel for appellant that the evidence discloses that defendant was not guilty of any negligence; that the plaintiff was guilty of contributory negligence; that the court erred in refusing to allow defendant's counsel to interrogate the plaintiff concerning a previous accident in which the plaintiff was involved; that the court erred in giving a certain right of way instruction and also in refusing to strike certain testimony with reference to plaintiff's injuries.

The record discloses that the collision occurred on November 6, 1951 at about 4:15 o'clock in the afternoon, at the intersection of South Elmwood Drive and Garfield Avenue in the City of Aurora. It was snowing and windy at the time, the visibility poor and there was about one inch of snow on the pavement which had become somewhat slick and packed from use. Garfield Avenue runs east and west and Elmwood Drive runs north and south. Both streets are paved, level streets about thirty-two feet wide and there are no stop signs or other traffic control devices at the intersection.

The plaintiff testified that she was traveling south on Elmwood Drive accompanied by her daughter, Susan, five years of age, and was returning home from St. Charles Hospital: that when the front of her car was in about the middle of the intersection, she noticed a car approaching from her right and she just kept on driving through the intersection and had proceeded until her car was about six or eight feet from the south curb of Garfield Avenue when the car of the defendant hit her. As she approached and before she entered the intersection, plaintiff stated that she was driving about fifteen or twenty miles per hour and looked to the right and to the left but saw no approaching traffic and she continued looking to the right and to the left before reaching the north sidewalk across line of the intersection. When she first saw defendant's car it was about the middle of the block or about 100 feet away to her right and it was her judgment that she had sufficient time to cross. The car driven by the defendant was coming from the west going east in the south half of Garfield Avenue and the front end of defendant's car hit the right rear fender and bumper of the plaintiff's car. The force of the collision spun her car around so that after the accident

The record discloses that the collision occurred on November 6, 1921 at about 4:15 o'clock in the afternoon, at the intersection of South Lincoln Drive and [illegible] in the City of Aurora. It was snowing and [illegible] visibility poor and there was about one [illegible] pavement with ice across about [illegible] Garfield Avenue and [illegible] and [illegible]. Both streets are [illegible] two feet wide and [illegible] devices [illegible].

The plaintiff [illegible] [illegible] at age, [illegible] [illegible] the [illegible] [illegible] section, and [illegible] [illegible] [illegible], [illegible] until [illegible] [illegible] of [illegible] the [illegible] about this [illegible] and looked to [illegible] traffic [illegible] [illegible] there was [illegible] [illegible] look [illegible] that she [illegible] [illegible] [illegible] of Garfield [illegible] [illegible] right [illegible] [illegible] of the collision [illegible]

it was headed north. The defendant's car skidded on through the intersection and came to rest up against the curb of the south-east corner of the intersection. The plaintiff testified that she had a conversation with the defendant right after the accident and in this conversation he told her that he was in a hurry and had not seen her in time to avoid hitting her; that he had come from taking his wife home from the office and that he was in a hurry to get back to his office.

The defendant testified that he was driving his 1949 Buick Sedan east on Garfield Avenue and that he was on his way to his office downtown; that it was a very bad day in respect to visibility and that it was snowing and blowing. There was snow on the street and ice and snow were coming down on top of the packed snow. He was driving some fifteen to twenty miles an hour and he observed the plaintiff's car when he was between seventy and eighty feet from the intersection. When he first saw the plaintiff's car it was about seventy feet north of the intersection and travelling about fifteen to twenty miles an hour and defendant attempted to stop by braking slightly but when he put on the brakes, his car skidded in a forward motion, not sideways; that he then put on the brakes a little harder, but his car continued to slide in a straight line until he hit the plaintiff's car. He was driving from six to eight feet from the south curb and his car strudk the right rear fender and right rear bumper of plaintiff's car. The defendant further testified that the plaintiff never slowed down as she approached and entered the intersection but he was unable to tell whether it was a man or woman driving in the plaintiff's car until a split second before the accident. He stated that he did not sound his horn and denied that he told the plaintiff that he

it was headed north. [illegible]
the intersection and came to rest up against the [illegible]
east corner of the intersection. [illegible]
she had a conversation with its occupants [illegible]
and in this conversation a fight [illegible]
and had not seen them [illegible]
come from [illegible]
in a hurry to [illegible] to office.

[illegible]
which [illegible]
to his office [illegible]
to visit [illegible]
[illegible]
[illegible]
an [illegible]
[illegible]
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interested in [illegible]
one and one [illegible]
when he [illegible]
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not in [illegible]
but the [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
around his [illegible]

was in a hurry to get back to the office and did not see her until it was too late.

Woodrow Wood, husband of the plaintiff, testified that he had a telephone conversation with the defendant in the evening of the same day of the accident and that the defendant told him that he had driven his wife home that day and that he was hurrying back to the office and that he had not seen the plaintiff in time to stop.

The foregoing recital is a fair statement of the substance of the testimony given at the trial bearing on the question of the contributory negligence of the plaintiff and the negligence of the defendant. Whether a plaintiff is guilty of contributory negligence is ordinarily a question of fact for the jury to decide under proper instructions. It becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence. (Ziralbo v. W. J. Lynch Co., 365 Ill. 197; Thomas v. Buchanan, 357 Ill. 270; Gauger v. Mills, 340 Ill. App. 1). The defendant insists that the plaintiff was guilty of contributory negligence in not seeing the defendant's car the first time that she looked to her right and that she will not now be heard to say that she looked, but did not see the car when the car was actually there. This is the general rule of law, but in this case the evidence is that at the time it was snowing heavily and visibility was poor. Negligence and contributory negligence were questions of fact for the jury to determine under proper instructions of the court and since the jury have found that the plaintiff was not guilty of contributory negligence, and that the defendant was guilty of negligence their verdict should not be disturbed.

was in a hurry to get back to the o[illegible]
it was too late.

cowboy hood, [illegible]
he had a telephone con[illegible]
of the same day [illegible]
back to the office [illegible]
[illegible] to [illegible].

[illegible]

At the request of the plaintiff, the court gave to the jury the following instruction: "The right of way given to vehicles approaching an intersection is not an absolute right. The law that gives the right of way to a vehicle approaching an intersection from the right of another vehicle does not contemplate that this right of way may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within recognized limits of speed, the car to the left will reach the line of crossing, before the car to the right would reach the intersection."

At the request of the defendant the court gave to the jury the following instruction: "The court instructs the jury that at the time of the occurrence in question in this case, there was in full force and effect and binding upon the parties to this case a provision of the Statutes of the State of Illinois, asfollows: 'Motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left.'"

Counsel insists that the court erred in giving plaintiff's instruction. In view of the fact that the court gave the foregoing instruction for the defendant, we do not believe it was reversible error to give plaintiff's instruction. In Gauger v. Mills, 340 Ill. App. 1, the factual situation was quite similar to that present here. In that case the plaintiff's truck was struck on the right rear fender by the defendant's car which had approached the intersection where the collision occurred from the right of the plaintiff. There were no stop signs or traffic control devices. The testimony as to the relative speeds

of the vehicles and their respective distances from the intersection was conflicting and, under those circumstances, the court approved the giving of the right of way instruction now questioned by defendant.

In Partridge v. Enterprize Transfer Co., 307 Ill. App. 386, a similar right of way instruction was under attack. In sustaining the propriety of giving the instruction in question, the court used this language: (p. 396) "We do not think that the instruction is subject to the criticism which has been urged against it. If the rule were other than stated in this instruction, then a vehicle coming from the right, no matter how far it would be from the intersection, would have the right of way, and the vehicles approaching from the left would be required to wait until the vehicle from the right would pass the intersection regardless of the time wasted in so doing, and if followed by a long line of cars, as is usual, a party coming from the left could not cross until all cars to his right had passed which would consume hours. This would be most impracticable." In our opinion the court did not err in giving the instruction complained of.

The defendant asserts that the court should have stricken certain testimony in regard to the plaintiff's injuries because they were not sufficiently related to the accident in question to be admissible in evidence. The evidence is that soon after the evening meal on the night of the accident, plaintiff became nervous and hysterical. Early the next morning she awoke and could hardly move her back and legs. Her condition became steadily worse. On November 9th she went to see Dr. Wunsch, her family physician. He found her complaining of back aches and

of the vehicles and their respective distances from the intersection was conflicting and, under those circumstances, the court approved the giving of the [illegible] now questioned by defendant.

In Reynolds v. Metropolis [illegible] Ala. 396, a similar [illegible] In sustaining the [illegible] question, the court [illegible] the instruction is [illegible] urged against it. [illegible] instructor, there [illegible] how far it would be [illegible] the [illegible] of way, and the [illegible] required to make until [illegible] the incorrect [illegible] and it follows [illegible] coming from the [illegible] right [illegible] improper locale. [illegible] the [illegible].

[illegible] the [illegible] stolen certain [illegible] because they were [illegible] question to be [illegible] soon after the [illegible] tiff became [illegible] awoke and could [illegible] became steadily worse. [illegible] her family physician. [illegible]

found her back to be spastic over the lumbar region. Her back was more or less rigid, which according to the evidence was due to the spasm of the muscles, which was evidence of trauma. Dr. Wunsch continued to see her about three times a week for the next two weeks. There was so little improvement in her condition that she was taken to the hospital and placed in traction and fitted with a surgical garment. While in the hospital, Dr. Wunsch diagnosed her difficulty as an injury to the supporting structure of the back muscles and gave it as his opinion that this condition could have been caused by an injury sustained by being thrown about in an automobile. The following January the plaintiff developed excessive bleeding from the uterus. Medication did not help this and Dr. Wunsch on February 20, 1952, operated on her and removed the uterus. He gave it as his opinion that the pain and nervousness suffered by the plaintiff as a result of the back injury received in the accident here in question could cause this excessive bleeding because the nerve ganglein along the back that are affected from the pain arising from the back injury would be stimulated and this in turn would stimulate the organs of internal secretion. Plaintiff had suffered slight bleeding of the uterus prior to the accident. In September, 1952, the plaintiff was hospitalized again, this time by an attack of polio. She responded favorably to treatment for polio and was apparently cured of it and does not now claim any causal connection between this accident and the polio attack she suffered. Plaintiff continued to be bothered by her back, and at the direction of Dr. Wunsch, she consulted Dr. Charles V. Heck a Chicago specialist, in November, 1952. He testified at the hearing as to her condition at the time she consulted him. He stated that upon flexion of the neck

she experienced a subjective pain in the lower part of her back; that when she stood he noted that the sway back, or lordosis in the lower back, was flat; that this condition indicated the presence of muscle spasm in the large muscles of the lower back; that when the plaintiff stood he noticed that she showed a list to the left, indicating the presence of muscle spasm; that when she tried to bend forward, she could not come any closer than twenty inches from the floor. Dr. Heck had X-Rays taken of her back. These failed to show any disease of the bone or any fracture or disease of any other joints of the lower back, but the X-Rays did show excessive motion present between the fourth and fifth lumbar vertebrae and that this indicated that the ligaments of the muscles which ordinarly supported these vertebrae had been stretched or weakened in some manner so as to destroy support of the joints. He also made certain laboratory tests, including a blood count, kidney and urine tests, all of which proved to be normal, and, the doctor testified, this ruled out the presence of disease as a causative factor of the low back pain suffered by the plaintiff. He testified that this back condition of the plaintiff was permanent and he gave it as his opinion, based upon a reasonable degree of medical certainty, that the condition he found in the plaintiff when he examined her might or could have resulted from the automobile collision which she had on November 6th, 1951, and that his opinion was based upon objective factors which he found upon examination of the plaintiff as well as her subjective complaints. On this point, Dr. Heck stated: "I think the fact that the patient suffering such an instability of the back and had experienced no difficulty or pain of any kind or character prior to the automobile accident in her back, and within twelve or fourteen hours of said accident did experience severe pain and trouble

in the back, would be significant. One would be more factually able to pin the symptoms to a definite accident when such a history is given. In other words, pain is able to date the on-set of the symptoms to a specific instant, and assuming the patient gives a correct history, then that rules out having had prior injury or disease or otherwise, which might have made this a pre-existing lesion."

The evidence shows that the plaintiff was thirty-one years of age, was married and the mother of three children. She testified that prior to the accident she was in good physical condition and "was as strong as a horse". Some of her neighbors corroborated this testimony. Before the accident she was always able to do her housework and worked long hours in the daytime and evening in a refreshment stand in a theater or as a clerk in a drug store, something which she was unable to do after she was injured. She was able in the year 1951, prior to the accident, from these outside jobs, to earn more than eleven hundred dollars. She tried to work after the accident but was unable to do so for more than a few days. The defendant offered no medical testimony to contradict the plaintiff's medical evidence. Thus we have a case where the doctors have testified that in their opinions there was a causal connection between the ailments from which plaintiff was suffering and the accident in which she was involved, as well as her own testimony, and that of her neighbors, as to her good health prior to the accident. We believe that such testimony sustained the burden of proof which the law imposed on the plaintiff of proving the causal relationship of the accident to her illness and disability. (Chicago Union Traction Co., et al, v. May, 221 Ill. 530; Hayward v. Metropolitan Ry. Co., 174 Ill.

App. 408.) The Trial court in our opinion did not err in refusing to strike the testimony concerning the plaintiff's injuries and her disability nor do we think the trial court erred in refusing to permit defendant's counsel to interrogate the plaintiff and her husband concerning the damages sustained by the car of the plaintiff as a result of a previous accident some four years prior to the instant collision. The damages to the car in which the plaintiff was riding in the previous accident was too remote to have any connection with the injuries sustained by the plaintiff in the present case. The court did however, permit defendant's counsel to cross-examine the plaintiff and her husband concerning injuries which she may have sustained in the previous accident.

Complaint is also made that the verdict of the jury is excessive. We have set forth quite fully the evidence as to plaintiff's injuries and as the amount she is entitled to recover is a question of fact for the jury to decide and they have fixed the amount at $15,000.00, in view of the plaintiff's large medical expenses, her loss of wages, her pain and suffering, and the permanency of her injuries, we are unable to say that the verdict is excessive.

We find no error in this record which would justify a reversal of this judgment.

Judgment Affirmed.

Mr. Justice Anderson took no part in the consideration or decision of this case.

Mr. Justice Anderson took no part in the consideration or decision of this case.

Abstract

Gen. No. 10709 Agenda No. 1.

IN THE

APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT.

FEBRUARY TERM, A. D. 1954.

EDNA C. WARD, Plaintiff-Appellee, vs. PEORIA TRANSIT LINES, INC., a Corporation, Defendant-Appellant.	Appeal from the Circuit Court of Peoria County, Illinois.

WOLFE,-- J.

Edna C. Ward was injured while riding as a passenger on a bus of the Peoria Transit Lines, Inc., in the City of Peoria, Illinois. On January 15, 1951, she started a suit in the Circuit Court of Peoria County, against the Peoria Transit Lines for damages that she sustained while riding as such a passenger. In her complaint she alleged that the defendant was transporting passengers for hire by means of motor vehicles, commonly known as motorbuses in the City of Peoria, Illinois; that on July 21, 1949, she was a passenger for hire on one of defendant's buses; that at all times she was in the exercise of due

care for her own safety; that there were double seats for two passengers and along the center line of the interior of said bus and from the front to the rear, was a passageway or aisle to permit passengers' entrance and egress; that plaintiff seated herself on one of the double seats on the left side of the bus approximately across from the side door; that on the same seat near the window was another woman passenger; that while the bus was proceeding in a south-westerly direction, the woman sitting next to the window on the same seat that she occupied, arose to get off of the bus at the next stop; that to permit said passenger to get into the aisle, plaintiff arose from her seat and stepped into the aisle; that while plaintiff was standing in the aisle the bus was negligently brought to a sudden stop, and as a direct and proximate result of said negligence of the motorman in bringing said bus to an abrupt stop, the plaintiff was thrown from her feet, hurled to the floor and sustained serious injuries. The plaintiff claimed damages in the sum of $35,000.

To this count of the complaint, the defendant filed an answer admitting that it was the owner and operator of the bus in question, but denied all other allegations in the complaint. On February 21, 1951, the plaintiff filed a second count to her complaint in which she realleged the ownership of the bus in question, and that she was a passenger for hire on the same and what she was doing at the time that she was injured. She charged the defendant with committing

one or more of the following negligent acts; namely, "That the defendant negligently and carelessly drove said bus at a dangerous rate of speed and while so doing, suddenly applied the brakes causing it to come to an abrupt halt; drove said bus at a speed greater than was reasonable and proper having regard for the safety of passengers, and while so doing suddenly and violently applied the brakes to said bus, hurling plaintiff to the floor; negligently and carelessly drove said bus at a high rate of speed, and while so doing, caused said bus to change its direction of traveling, hurling plaintiff to the floor of said bus, and caused said bus to be driven at a speed greater than was reasonable and proper, having regard to the traffic and use of the way, so as to endanger the life of the passengers, including the plaintiff and contrary to the Statute of the State of Illinois."

The defendant filed its answer to this amended complaint, in which it denied all the material allegations of the complaint. The case was tried before a jury, and at the conclusion of the plaintiff's case the defendant entered a motion for a directed verdict in its favor. This motion was denied. The defendant then submitted evidence to the jury, and at the close of all of the evidence, it renewed its motion for a directed verdict in its favor. This motion was also denied. The case was submitted to a jury that found in favor of the plaintiff for $6,500. The defendant entered a motion for a new trial, which the Court overruled. Judgment was then entered on the verdict, and it is from this judgment that the defendant has perfected an appeal to this Court.

The plaintiff testified that she paid her fare as she entered the bus, and took a seat towards the back part of the bus; that the seats were arranged for two passengers and that a lady was sitting on the inside, or next to the window and that she was on the outside seat next to the aisle; that the lady next to the window indicated that she wanted to get off at the next stop of the bus, and in order for her to get out of the seat, the plaintiff stepped out into the aisle and held onto the railing above the seat for protection; that without any warning, the bus suddenly came to an abrupt stop, and she was thrown forward and was severely injured. This evidence is not in dispute, as all of the witnesses testified that the bus did come to an abrupt stop, and both of these ladies that had been standing in the aisle were thrown to the floor.

It is not questioned by the defendant in this appeal that the judgment is excessive. There is a sharp conflict in the evidence as to how fast the bus was traveling. The plaintiff testified that in her judgment the bus was traveling between twenty-five and thirty miles per hour. The witnesses for the defendant testified that in their opinion the rate of speed was from ten to twenty miles per hour. The defendant's witnesses testified the cause of the abrupt stop of the bus was that a boy riding a bicycle had fallen in front of the bus and that the boy just appeared in front of the bus a very short time before the motorman applied his brakes and stopped the bus.

At the request of the plaintiff the Court gave the

following instruction: "The Court instructs the jury that if you find from the greater weight of the evidence, that the defendant, Peoria Transit Lines, Inc., at the time and place of the accident and immediately prior thereto was operating its motor bus at a speed that was greater than was reasonable and proper having regard for the traffic and use of the way, or so as to endanger the life or limb or injure the plaintiff and if you further believe from a preponderance of the evidence that in so doing it was guilty of negligence, and if you further believe from a preponderance of the evidence that as a direct result thereof, the plaintiff, Edna C. Ward was injured, and if you further believe that at said time the plaintiff was in the exercise of all due care and caution for her own safety, then under such state of the proof, your verdict should be for the plaintiff."

The defendant claimed the Court erred in giving this instruction, as it contains no reference to the charge that the bus was abruptly stopped. In most of the charges of negligence in the complaint, this element is included, but that last part of the amended complaint does not charge that the abrupt stopping of the bus was the cause of her injury, however, we do not see how this instruction could possibly have misled the jury, as there is no question as to what caused the injuries to the plaintiff, as the bus did come to an abrupt stop.

It was the duty of the defendant to exercise a high degree of care in seeing that passengers on their buses

were not injured by its negligence. It is argued that perhaps if the plaintiff had turned around in her seat and let the other passenger go in front of her, that she would not have been injured. This does not in any way tend to prove that the plaintiff was guilty of any negligence that contributed to her injury, or that she did anything that the ordinary passenger would not have done under like circumstances.

In our conclusion the evidence does not tend to prove in any manner that the plaintiff was guilty of any contributory negligence that proximately caused her injuries.

It is not contended that there was any other error in the case, so it was a question of fact for the jury to decide. If this Court had been hearing the evidence, we might have decided differently. Unless we can say that the verdict of the jury is contrary to the manifest weight of the evidence, the verdict of the jury should be sustained. From a reading of the evidence as abstracted, it is our conclusion that there is sufficient evidence to sustain the verdict and judgment of the trial court. The judgment is therefore affirmed.

Judgment affirmed.

Mr. Justice Anderson took no part in the consideration or decision of this case.

Mr. Justice Anderson took no part in the consideration or decision of this case.

2 Ill. App 2d Part 2
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General No. 10732 Agenda No. 8

IN THE

APPELLATE COURT OF ILLINOIS

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SECOND DISTRICT

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February Term, A. D. 1954

EMMA M. DANA, Plaintiff-Appellant, vs. BERNARD B. NEUCHILLER, Defendant-Appellee.	Appeal from the Circuit Court of McHenry County, Illinois.

Dove, J.

Emma M. Dana filed her amended complaint in the Circuit Court of McHenry County, which was afterward amended. The trial court sustained a motion of the defendant to dismiss the amended complaint, as so amended, and the plaintiff, having elected to abide her amended complaint, as so amended, judgment was entered against her in bar of the action and for costs. To reverse that judgment, plaintiff appeals.

Count one of the amended complaint as amended alleged that on December 13, 1946, the plaintiff was in good health, regularly employed and earning large sums of money as wages; that defendant at all times mentioned in the complaint was and still is a physician and surgeon duly licensed to practice his profession and engaged in its practice in Woodstock, McHenry

County, Illinois; that on or about December 13, 1946, plaintiff consulted defendant professionally for a minor infection which was causing her to cough, and from that time on she became and continued to be his patient and defendant became and continued to be her doctor until July 13, 1951, and during all of said time defendant undertook, as her physician and surgeon, to diagnose and treat her ailments and illnesses; that it then and there became the duty of the defendant to make an honest and true diagnosis and to treat plaintiff's ailments ethically and lawfully, so as to benefit but not to injure plaintiff; that in violation of his said duty to plaintiff and with intent to enrich himself at plaintiff's expense and in order to extort large sums of money from her, without any legitimate ground therefor and to which he was not entitled, defendant pretended to diagnose in plaintiff the following illnesses: (a) Incurable cancer, on or about December 13th, 1946; (b) Heart trouble and other circulatory diseases, in January 1947; (c) Tuberculosis and cancer of the lungs, in September 1947; (d) Ruptured appendix and peritonitis, in July 1948; (e) Nephritis, in August 1948.

This count further alleged that the defendant charged the plaintiff and received from her for his services, treatments and medicines during the period of time that she was under his care, as aforesaid, the aggregate sum of $7,940.00; that at the times defendant made the purported diagnoses of plaintiff's illnesses, as heretofore set forth, and at the times that he made the charges against the plaintiff and received payments from her, he knew that plaintiff was not suffering from any of

said illnesses and that she did not need any of the treatments or medicines defendant gave her; that at the time plaintiff made each payment to defendant for his purported services, she did not know that defendant's charges for his purported services and medicines and treatments had been made by the defendant for illnesses with which she was not afflicted and for medicines and treatments that she did not need; that during the entire period of time that plaintiff was defendant's patient, as herein alleged, plaintiff had implicit confidence in defendant's honesty and integrity and relied thereon; that on July 13, 1951, she discovered for the first time that said purported diagnoses of her illnesses by the defendant were false and fraudulent and that the treatments and medicines for which the defendant had been charging the plaintiff, as aforesaid, were wrongful and injurious and were merely the means which defendant employed to obtain large sums of money from the plaintiff to which he was not entitled; that defendant fraudulently concealed from the plaintiff until July 13, 1951, the fact that his various diagnoses, hereinabove mentioned, were false and fraudulent and that the treatments and medicines he had prescribed and given her were unnecessary, wrongful, and injurious.

The second count of plaintiff's amended complaint, as amended, re-alleged substantially all the matters and things set forth in the first count and, in addition thereto, averred that at all times mentioned in her complaint the plaintiff was in the exercise of proper care and caution for herself and charged that the defendant, as a physician and surgeon, knew that his unnecessary treatments and medicines were bound to

affect plaintiff's health and her earning capacity; that defendant, with reckless disregard of consequences, prescribed and gave plaintiff the unnecessary treatments and medicines as alleged; that for a long time immediately preceding October 17, 1950, plaintiff was gainfully employed and earned large sums of money; that on said date she lost her steady employment because she had become nervous and irritable as a result of the drugs and treatments that the defendant had so unnecessarily given her; that she has been and still is unable to secure permanent employment or to stay in any employment for more than a few days or hours; that on July 13, 1951, the plaintiff, for the first time, discovered that the defendant's diagnoses, treatments, and medicines were unnecessary, false, fraudulent, and intentionally wrongful and injurious; that defendant fraudulently concealed from the plaintiff the fact that his various diagnoses were false and fraudulent and the treatments and medicines that he had been prescribing and giving her were unnecessary, wrongful, and injurious until July 13, 1951; that she had no record or dependable knowledge of the specific medicines and treatments so wrongfully prescribed and given her by the defendant and, therefore, must depend on defendant's records thereof. This count also prayed for judgment against the defendant for $50,000.00.

In her third count, plaintiff alleged that on July 5, 1951, the defendant, without any provocation or excuse, attempted to kill the plaintiff by forcing her to swallow certain pills, the nature of which is known to the defendant but unknown to

plaintiff; that said pills caused the plaintiff to become and remain unconscious from 8:30 a.m. till past midnight of said day; that upon recovering consciousness, she felt great physical and mental pain for a long time and until July 13, 1951; that plaintiff did not know and did not suspect that defendant forced her to swallow such pills for the purpose of murdering her until he told her so on July 13, 1951; that on July 13, 1951, defendant made a second attempt on plaintiff's life by means of certain medicines which defendant wrongfully, wantonly, and maliciously, and without necessity or provocation on plaintiff's part, injected into her body; that said injected medicine caused the plaintiff to go into a coma which required the resuscitating equipment and services of the police force of the City of Woodstock to revive her, and that as a direct and proximate result of defendant's second attempt on plaintiff's life , she became violently ill and suffered great bodily pain and mental anguish and lost between twenty-five and thirty pounds of weight. This count averred that malice was the gist of the action and concluded that plaintiff is entitled to actual and punitive damages and prayed for judgment against the defendant for $50,000.00.

The trial court held that the allegation in count one wherein it is charged that "defendant pretended to diagnose in plaintiff" various enumerated illnesses was ambiguous and that the statute of limitations barred plaintiff from recovering upon a portion of her demand. "Pretended" is defined in the American College Dictionary as "insincerely or falsely professed, feigned, fictitious or counterfeit," and in Webster's Unabridged

Dictionary "pretend" is defined as: "to hold out falsely, to allege falsely, to make false representation of, to hold out appearance of being, to profess, to make believe." There is nothing ambiguous about the charge made, and the word "pretended" as used in this count has a definite and well-defined meaning. Ordinarily the statute of limitations is an affirmative defense, and unless it appears from the face of the complaint as a matter of law that the cause of action for which recovery is sought is barred, the defense cannot be made by a motion to strike. In our opinion, it does not affirmatively appear that any of the items therein mentioned are barred by the statute of limitations, inasmuch as plaintiff has alleged that the defendant's false diagnoses and treatment of her illnesses and ailments were concealed from her by the defendant until July 13, 1951, which date would bring the matters for which she seeks recovery well within the statute. In Burnett v. West Madison Street Bank, 375 Ill. 402, 408, the court said: "The Statute of Limitations is an affirmative defense and the burden of proving it rests upon the party pleading it. (Schell v. Weaver, 225 Ill. 159). It is a well-established principle of pleading that the Statute of Limitations cannot be raised by a demurrer or motion to strike unless it affirmatively appears from the pleadings attacked, that the cause of action is barred by the particular section of the Limitations act being interposed as a defense . . ." In Schmucking v. Mayo, 183 Minn. 37, which was an action for malpractice and which was decided on the pleadings, the court stated: "The rule,

which is supported by the numerical weight of authority, is that when a party against whom a cause of action exists in favor of another, by fraudulent concealment prevents such other from obtaining knowledge thereof, the statute of limitations will commence to run only from the time the cause of action is discovered or might have been discovered by the exercise of diligence. This is the rule apart from any statute. It also seems to us that the rule as stated is supported by the weight of moral and equitable principles, which in our practice are not entire strangers in actions at law. If one's legal title to property is endangered by the fraud of another, the courts will give relief; and if the rights which one has to a legal remedy to establish such title be defeated by a like fraud, is not the principle the same? Two reasons adequately support the rule; First, one who cannot assert his right because the necessary knowledge is improperly kept from him is not within the mischief the statute was intended to remedy, but is within the spirit of the law that restrains its operation. There is no reason, resting on general principles, why ignorance that is the result of defendant's actual fraud and not the stupidity or lack of diligence of plaintiff should not prevent the running of the statute in favor of the wrongdoer. Secondly, a person should not be permitted to shield himself behind the statute of limitations where his own fraud has placed him. He should not be permitted to profit by his own wrong, and it would strike the moral sense strangely to permit him to do so. We are not aware of any principle of law or equity which affords immunity to a fraudulent defendant who by his deceitful practice induces a

creditor to forbear his efforts to collect his debt until after it has become barred by the lapse of time. Fraud is bad, it should not be permitted to go unchecked anywhere, and justice should always be able to penetrate its armor. We are not of the opinion that fraudulent concealment tolls the statute of limitations."

It is insisted by counsel for defendant that count two violated the provisions of paragraph (2) of Section 33 of the Civil Practice Act (Chapter 110, Par. 157 (2), Ill. Rev. Stat.) which requires each count of a complaint to be divided into separate paragraphs numbered consecutively. In drafting her amended complaint, plaintiff incorporated in paragraph three of count two, by reference, paragraphs 2, 3, 4, 6, and 8 of count one. This made paragraph three of count two contain five paragraphs numbered 2, 3, 4, 6, and 8. The plaintiff then numbered the next paragraph of count two as paragraph number four and the next paragraph as number five, and so on. This made count two contain two paragraphs numbered two, two numbered three, and so on, and counsel contends that such numbering procedure made it impossible for him to answer intelligently plaintiff's amended complaint. What plaintiff should have done, of course, in order to keep the numbering of the paragraphs of count two of her amended complaint clear was to have incorporated by reference paragraphs 2, 3, 4, 6, and 8 of count one of her amended complaint as and for paragraphs 3, 4, 5, 6, and 7 of count two of her amended complaint and then

continued numbering the paragraphs of count two consecutively, which would have made the next paragraph of count two number eight instead of number four, as plaintiff actually numbered it. Plaintiff's method of numbering the paragraphs in count two was not artful but, as we view it, it could be answered by the defendant by a little more careful reference than ordinarily would be required.

Count three of plaintiff's amended complaint, as amended, was stricken by the court for the reason that in this count the plaintiff joined two separate and distinct causes of action contrary to Section 33, paragraph two, of the Civil Practice Act. An examination of count three shows that plaintiff alleged that on and about July 5, 1951, the defendant attempted to kill her by forcing her to swallow certain pills, which pills caused the plaintiff to become and remain unconscious for quite some time and to suffer great physical and mental pain and, also, that on July 13, 1951, defendant made a second attempt to kill plaintiff by wilfully, wantonly, and maliciously injecting into her body certain medicine which caused plaintiff to go into a coma and which made her violently ill and caused her to suffer great bodily pain and mental anguish and to lose between twenty-five and thirty pounds of weight. Paragraph 2 of Sec. 33 of the Civil Practice Act (Chap. 110, Par. 157 (2), Ill. Rev. Stat.) provides: "Each separate claim or cause of action upon which a separate recovery might be had, shall be stated in a separate count or counterclaim, as the case may be, and each count, counterclaim, defense or reply, shall be separately

pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing as, nearly as may be, a separate allegation." Rule 12 of the Rules of Practice and Procedure (Chap. 110, Sec. 259, 12) provides: "Different breaches of a contract, bond or other obligation, and different breaches of duty, whether statutory or at common law, or both, growing out of the same transaction, or based on the same set of facts, may be treated as a single claim or cause of action, and set up in the same count."

In count three two separate claims or causes of action upon which separate recoveries might be had have been joined contrary to the provisions of the Civil Practice Act and the Supreme Court rule governing such matters. The two instances when defendant tried to take plaintiff's life constituted two separate and distinct offenses and comprise two separate sets of facts and, therefore, could not be joined in the same count. (Randall Dairy Co. v. Pevely Dairy Co., 270 Ill. App. 350,354.) The court properly struck count three, but in our opinion counts one and two, while inartfully drawn, were sufficient to require the defendant to answer.

The judgment of the trial court striking counts one and two is reversed and the cause remanded to the trial court with directions to overrule defendant's motion as to these two counts and to rule the defendant to answer them. The judgment of the trial court striking count three is affirmed.

Judgment affirmed in part and reversed in part. Cause remanded with directions.

Mr. Justice Anderson took no part in the consideration or decision of this case.

Mr. Justice Anderson took no part in the consideration or decision of this case.

Gen. No. 10745 Agenda No. 13.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

FEBRUARY TERM, A. D. 1954.

JOHN GEORGE SCHIRO Administrator of the Estate of George Schiro, Deceased, Plaintiff-Appellant, vs. JOHN SCHIRO, and FRANCES SCHIRO, Defendants-Appellees.	Appeal from Circuit Court Winnebago County.

WOLFE,-- J.

In July 1953, John George Schiro, Administrator of the Estate of George Schiro, deceased, filed a suit in the Circuit Court of Winnebago County against John Schiro and Frances Schiro asking for judgment against them on two promissory notes. One note was dated November 6, 1931, for $925 and the other dated June 18, 1932, for $1250. It is alleged in the complaint that the defendant made numerous payments on said notes and therefore they were taken out of the Statute of Limitations.

The defendants filed their answer to this complaint

and denied any payments were made on the notes and as a special defense that John Schiro had been adjudged a bankrupt in 1936, and these notes were listed as obligations in the bankruptcy proceeding, also that there was no one legally authorized to accept payments on the notes, as alleged in the plaintiff's complaint, and that the Statute of Limitations had run against the obligation prior to the time of the filing of the suit. The plaintiff filed a reply to the affirmative defenses as set forth in the defendants' answer.

The evidence was submitted to a jury and after the plaintiff's evidence was heard, the defendants entered a motion for a directed verdict. The Court sustained the motion and directed a verdict for the defendants. The jury rendered their verdict in conformity with the Court's directions and the Court entered judgment on the same, and against the plaintiff for costs and this appeal follows.

The only question in this suit is, whether there was sufficient evidence introduced by the plaintiff when considered in the light most favorable to them, to have the case submitted to a jury for its decision.

There is no question that the defendant signed the notes, as alleged in the complaint, and there is no question that there was one payment of $100 made on November 1, 1952, and another payment of $25, both of these payments being made to Maria Schiro, the mother of the plaintiff, and the widow of the payee, in the original notes. George Schiro, the payee in the notes, died on the 28th day of May 1945. He left his widow, Maria Schiro, and a son, John George Schiro, as his

only heirs at law. No administration was taken out on the estate of George Schiro until May 1953, which was after the payments were made to Maria Schiro. John George Schiro was appointed administrator of his father's estate.

He testified that he was the administrator of the estate of his father and produced his letters of administration. He stated that he and his mother and a man by the name of Cacciatore were present, when John Schiro paid his mother $100, and at another time John Schiro paid his mother $25, and that these payments took place about a year before the time he testified, and that at the time of the payment John Schiro stated to his mother, "Why don't we settle the thing and be friends again rather than to keep on putting it out all the time?"

Mamie Schiro testified that she was the wife of John George Schiro and she was present in her home when the uncle, the defendant, came to her house and had a conversation with her mother-in-law; that she heard the conversation between them and that John Schiro paid her mother-in-law $100 and stated that he was willing to settle for the rest of the money; that John Schiro agreed to settle for about $1,000; that the $100 was paid by John Schiro to her mother-in-law before anything was said about the settlement of the balance of the claim.

Jennie Stassi was called as a witness for the plaintiff and testified that Mrs. Schiro wanted some money from Mr. Schiro and that Mr. Schiro told Mrs. Stassi that he would give two lots to Mrs. Schiro, the wife of the deceased, George Schiro, in settlement of the notes. A day or so later

John Schiro's son, came and brought $25 to apply on the note. This answer was stricken by the Court, and the jury were instructed to disregard it.

Maria Schiro, the widow of George Schiro, deceased, testified that "Around November 1952, Mr. Schiro, the defendant, came to my house and brought one hundred dollars. He paid me that one hundred dollars. He said that within two months he would bring me the additional one thousand dollars, but he never did bring the one thousand dollars to my house." After he gave me the one hundred dollars then I told him I wanted all the money which I had coming to me and he answered: "He would give it back to me little by little."

John Schiro was called by the plaintiff under Section 60 of the Civil Practice Act, as an adverse witness. He denied that he had ever sent his son, Mitchell, to pay any money to any one, on any notes. He stated that he had talked to Mrs. Stassi on the telephone and she asked him to give a couple of lots to the plaintiff's mother, so we could call all the notes paid. He stated that he first wanted to give the lots to pay the notes, but he changed his mind and said: 'No.' He denied that he ever paid any money on the notes, but that Mrs. Schiro came to his store and started hollering and said: "I have got to have $100," and he told her he had gone bankrupt, but she still said: "She had to have $100." He told her if she needed $100 he would give it to her, but nothing was said about paying it on the note. He denied that there was any agreement to settle the notes for $1,000; that he had just handed her $100 to make a gift to her. This is the substance of the testimony

given in the case.

In considering the sufficiency of the evidence on a motion for a directed verdict, the Court must look only to the evidence, which is most favorable to the party moved against. Contrary evidence is not considered, and there is only for review the question whether there is fairly sufficient evidence taken as aspect most favorable to the plaintiff, together with all reasonable inferences therefrom, which tend to support the case charged in the complaint. Cook vs. Kirgan, 332 Ill. App. Page 294, and Walaite vs. Chicago R. I. & P. Ry. Co., Vol. 376 Ill. Page 59.

Here the plaintiff produced positive evidence that there was a $100 and a $25 payment made on the note. The mother and wife of the plaintiff testified positively that any conversation in regard to the compromise of the indebtedness was made after the payment of the $100.

It is our conclusion that the Court erred in directing a verdict in favor of the plaintiff, but should have submitted the question of payment to the jury for its consideration. The judgment is reversed and remanded to the Circuit Court of Winnebago County.

Reversed and remanded.

Mr. Justice Anderson took no part in the consideration or decision of this case.

Mr. Justice Anderson took no part in the consideration or decision of this case.

46150

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation, Appellee,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
EDWARD J. MEYERS COMPANY, a corporation, Appellant.	)	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court of Chicago against defendant for property damage to its locomotive occasioned as a result of a collision between plaintiff's locomotive and defendant's five-ton motor truck. Defendant filed a counterclaim seeking redress for damages to its truck allegedly due to the negligence of plaintiff in operating its freight train. From a judgment for plaintiff in the sum of $1,550.70 and a judgment on the counterclaim in favor of the plaintiff, defendant appeals.

Sometime before the accident in question defendant had parked its truck on a thoroughfare in the City of St. Charles, which thoroughfare descends at a sharp incline from the place where the truck was parked to plaintiff's railroad tracks. The driver, having left the truck, proceeded into the premises of a customer, and, while he was absent, the truck rolled down the hill onto plaintiff's tracks, coming to rest against an embankment, at a point along the tracks about fifty yards west of a highway crossing. Although he tried, the driver was unable to

move his vehicle. There was a watchman at the highway crossing near which the truck came to rest, employed by plaintiff, and there is testimony that he requested the truck driver to get the truck off the tracks. The truck driver left to get a tow truck, but before he returned plaintiff's freight train collided with the truck. There is testimony that the flagman tried to flag the train as it approached, but did not go down the track to meet it. From fifteen to twenty minutes intervened between the time the truck came to rest on the tracks and the collision.

Plaintiff's engineer and fireman testified that their train, consisting of three diesel units and one-hundred mixed cars, approached the scene of the accident from the southeast at a speed of 35 miles an hour; that they first saw defendant's truck when the train rounded a curve about 2,000 feet from the truck and thought the truck was upon the crossing; that the engineer used his emergency brake when he realized the truck was standing still west of the crossing, but was not able to stop in time to avoid the collision; that the train came to a stop about 400 feet west of the point of impact.

Defendant argues that the verdict is against the manifest weight of the evidence for the reason that negligence of plaintiff's flagman was the sole cause of the accident inasmuch as he had knowledge of the perilous position of defendant's truck from fifteen to twenty minutes before the collision. It does not appear what the plaintiff's

flagman could have done that was not done by the driver of the truck. The flagman's primary duty was to flag the crossing, and we are unable to say from the evidence that his conduct in remaining at his post of duty, notwithstanding that the track was blocked, was negligence. We think it a question of fact for the trial court.

Defendant further charges that there was no evidence of negligence on the part of the defendant in its management of the truck. The truck driver testified that before leaving the cab he set the brake, put the truck in reverse gear and turned off the engine, leaving the key in the lock. The trial court was not required to accept the testimony of defendant's witness as true, even though uncontradicted, if that testimony is inherently improbable. Lasky v. Smith, 407 Ill. 97, 106. It is a matter of common knowledge that an automobile will not roll down a hill if the vehicle is in reverse gear, or if a properly operating emergency brake is set or if the wheels are so directed as to cause the vehicle to run into the curb in the event of movement. We think the fact that the vehicle rolled down the hill is evidence that proper care was not taken by the driver when he left the truck standing on the hill. This conclusion is supported by a statement of the rule in 16 A.L.R. 2d 979, at page 1008, as follows:

> "When an automobile is left parked upon a grade from which it might reasonably be expected to move if unsecured, the driver, in addition to effectively setting the brakes, may be required to take further precautions. One of the most common of these extra precautions is the turning of the front wheels toward the curb, so that if the brakes do fail the machine will be brought up by contact with the curbing."

There is no evidence that this latter precaution was taken.

Furthermore, the Motor Vehicles act, Ill. Rev. Stat. 1951, chap. 95-1/2, par. 189, provides:

> "(a) No person driving or in charge of a motor vehicle shall permit it to stand unattended * * * when standing upon any perceptible grade without effectively setting the brake thereon and turning the front wheels to the curb or side of the highway."

We think the questions here involved were questions of fact and we would not be justified in interfering with the finding of the trial court. The judgment of the Municipal Court of Chicago is affirmed.

Judgment affirmed.

Schwartz, P. J., and Robson, J., concur.

57 A

46180

WILLIAM SCOTT, Plaintiff below, v. LULU SCOTT, Defendant below, Appellee. ——— HELEN SCOTT, Petitioner below, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

12 I.A.2d 172

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

A decree of divorce was entered by the Superior Court of Cook County on January 16, 1923 in favor of plaintiff William Scott against Lulu Scott on the ground of desertion. On May 31, 1946, William Scott married Helen Scott, appellant herein, and they lived as husband and wife until October 15, 1951, when William Scott died. Helen Scott was appointed administratrix of the estate of William Scott. On December 19, 1952, almost 30 years after the decree of divorce was entered against Lulu Scott, and more than 14 months after William Scott died, Lulu Scott filed a petition to set aside the divorce. After a hearing in the Superior Court an order was entered setting aside the divorce. The grounds for vacating the decree were failure to receive notice of the filing of the complaint for divorce, and failure to learn of plaintiff's divorce until after his death.

No brief has been filed here for appellee.

Upon the hearing before the chancellor the principal witness was Lulu Scott. Over objection that she was incompetent under section 2 of the Evidence Act inasmuch as Helen Scott, the administratrix of the estate of William Scott, was opposing the petition, Lulu Scott was permitted to testify. We think that under the circumstances she was not competent to testify. In the case of In re Estate of Maher, 210 Ill. 160, the court said:

> "The person who in this cause seeks to establish the fact that she was the wife of the deceased at the time of his death, if she testify, is testifying against the heirs of the deceased, and to do that she is incompetent. * * *
>
> "We therefore hold that a woman claiming to be the lawful widow of a dead man, whose claim in that regard is denied by others who have interests, or assert interests, as heirs, in his estate, is incompetent to testify to the fact of her marriage in a proceeding in which she seeks, as distributee, a portion or all of his personal property, until her status as such widow has been conceded or has been established by the adjudication of a court having jurisdiction of the subject."

Furthermore, the decree of divorce here sought to be set aside was entered more than thirty years before any attempt was made to question its validity. Property rights involving others have since intervened. Granted the contention as made, that plaintiff did not learn of the divorce until after William Scott's death, the record is still devoid of proof sufficient to establish want of jurisdiction at the time the decree was entered.

The judgment of the Superior Court of Cook County is reversed.

Judgment reversed.

Schwartz, P. J., and Robson, J., concur.

2 Ill. App. 2d Part 2

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A. D. 1954

Abstract

General No. 9934 — Agenda No. 30

Donald H. Buckley, Administrator of the Estate of Margaret Buckley, deceased, Plaintiff-Appellee, vs. Wabash Railroad Company, a Corporation, Allen W. Gill and Robert Yount, Defendants-Appellants.	Appeal from Circuit Court of Sangamon County

2 I.A. 173

CARROLL, J.

Margaret Buckley, plaintiff's intestate, died as the result of injuries sustained in a collision between an automobile driven by plaintiff, her husband, in which she was riding, and the engine of a freight train operated by Wabash Railroad Company.

A jury trial of an action for her death brought against Wabash Railroad Company, and the engineer and fireman of its train, resulted in a verdict for plaintiff in the sum of $10,000.00. Motions for judgment notwithstanding the verdict and for a new trial were overruled, and from the judgment entered on the verdict defendants have appealed.

The charges of negligence made against the defendants in the complaint upon which the cause went to trial are negligence in the operation of the train, negligence in failing to have a headlight lighted on the engine, failing to ring the bell or blow the whistle for at least 80 rods from the crossing, and failing to continue blowing the whistle or ringing the bell until the crossing was reached, as

required by Statute, and operating the train at an excessive rate of speed.

As grounds for reversal of the judgment defendants urge that the Trial Court erred in failing to hold (1) the verdict to be against the manifest weight of the evidence; (2) that as a matter of law plaintiff was guilty of contributory negligence; and (3) that as a matter of law plaintiff failed to prove that the decedent was in the exercise of due care for her safety at the time of the accident.

From the evidence in the record, it appears that on September 28, 1952, some time between midnight and 1 o'clock A.M. plaintiff and his decedent were riding in an automobile being driven by plaintiff in a northerly direction on 11th Street in the City of Springfield. The weather was clear and fairly warm. 11th Street runs north and south, and the Wabash Railroad tracks cross said street at an angle running from the northeast to the southwest. There are two tracks at the crossing which will be referred to as the north track and the south track. As it crosses the tracks 11th Street does not run in a straight line, but angles to the right or east and then continues straight north. Thus, traffic proceeding north on 11th Street is required to cross the south track on an angle to the right, and after crossing said track, to angle to the left before crossing the north track and continuing north. The distance from the most southerly rail of the south track to the point where the collision occurred is from 90 to 100 feet. The crossing is unguarded being marked only by a cross arm sign upon which appears the words "Railroad Crossing Two Tracks". The tracks approach 11th Street from the northeast at the end of a long curve and cross it at an angle running in a southwesterly

required by statutes, and operating the cycle at an economic rate of speed.

direction. There were four telephone poles and a switch tie sticking in the ground, which would be in the line of vision of a person approaching the crossing and looking to the east.

Plaintiff and defendant Robert Yount, fireman of the train, were the only occurrence witnesses.

Plaintiff testified that he was driving north on 11th Street at 20 to 25 miles per hour; that he knew there was a railroad crossing at the place where the accident occurred; that when he was about 40 feet from the crossing he slowed down to 15 to 20 miles per hour; that he looked to his left and then looked to his right and did not see anything; that there was no traffic noise in the street to distract his attention or interfere with his hearing; that he saw no headlight or reflection from the engine headlight; that he then proceeded to and did cross the south track; that as he straightened his car out into 11th Street preparatory to crossing the north track, his wife, the decedent, hollered "Watch out, Dad"; that he did not see the train until decedent hollered; that when he looked the train was crashing into the car; and that decedent was severely injured and died shortly thereafter.

Robert Yount, the fireman, testified that as the train approached the 11th Street crossing he was sitting on the fireman's seat box looking out the window; that the train was travelling 10 to 12 miles per hour; that it was his duty to keep a look-out for traffic approaching a crossing, and in the event he believed there was going to be an accident, to warn the engineer; that he first saw plaintiff's car 225 to 250 feet from the crossing; that it was going 20 to 25 miles per hour; that it did not appear to change speed; that the engineer blew the whistle at about 150 feet from the crossing; that the engine

headlight was on and the bell ringing; that when the engine was about 40 feet from the crossing he hollered to the engineer to stop the train as he felt there was going to be an accident; that the engineer applied the brakes; that the train did not stop immediately, but travelled about 200 feet; that the engine struck the right side of plaintiff's car about the cowl post; and that after the accident the plaintiff's car was on the front of the engine about 75 to 100 feet west of the crossing. The defendant, Allen W. Gill, engineer of the train at the time of the accident, and other members of the train crew corroborated Yount's testimony as to the speed of the train, the burning of the headlight, the blowing of the whistle and the ringing of the bell. Frank Dixon, a Springfield police officer, testified that when he arrived at the scene some time after the accident, the engine headlight was lighted. Harold Johnson, another police officer, called by the plaintiff, testified that it was necessary to approach within 36 feet of the south track in order to see an engine coming around the curve from the northeast. A photograph taken at night depicting the crossing as it appears looking north at 11th Street, and a photograph taken at night showing the curve in the tracks as they approached the intersection with 11th Street were introduced in evidence by the plaintiff. Photographs of the crossing and adjacent area taken in the daytime were introduced by the defendants.

The record also contains expert testimony accompanied by plats offered by defendants on the question as to the sufficiency of the illumination at the crossing and also as to the distance at which a train approaching from the east would be visible in the daytime to the driver of a car coming from the south on 11th Street. This distance was fixed by the expert witness at 787 feet.

headlights was on and the bell ringing; that when the engine was about
40 feet from the crossing, he noticed to the engineer to stop the train
as he felt there was going to be a collision; that the engineer replied
the brakes; that the train [illegible]
200 feet; that the engine [illegible]
about the road bed [illegible]
was on the front of the engine [illegible]
ing. The [illegible]
of the accident, [illegible]
Young's testimony [illegible]
Ben Hill, the [illegible]
Frank [illegible]
arrived at [illegible]
was killed [illegible]
Plaintiff's [illegible]
of the [illegible]
from the [illegible]
as it [illegible]
night [illegible]
[illegible]
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introduce [illegible]
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While the foregoing is not a detailed recital of all the evidence in the record, it substantially embodies the facts and circumstances considered by the jury in reaching its verdict.

Conforming to a well established rule, the Trial Court would not have been justified in holding as a matter of law that plaintiff was guilty of contributory negligence and that his intestate failed to exercise due care, unless it could be said that under the evidence all reasonable men must reach the same conclusion. Keturoski v. Ind. H. S. R. Co., 1 Ill. App. 2d. 88; Bales v. Penn. R. Co., 347 Ill. App. 466; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104. If there was any evidence tending to show due care upon the part of the plaintiff and his intestate, then the question as to whether such proof was sufficient to sustain the allegations of the complaint with reference thereto became an issue to be determined by the jury.

Reference has been previously made herein to the testimony of the plaintiff as to what he did just prior to entering the crossing and also to the physical situation at the crossing as it appeared in the nighttime as disclosed by the photographs in evidence. These photographs depicting as they do the telephone poles between 11th Street and the tracks, the absence of a street light in 11th Street north of the crossing, the jog in 11th Street at the crossing and the curve in the tracks as they approach the crossing, coupled with plaintiff's testimony, must be considered evidence from which a reasonable inference supporting plaintiff's allegations of negligence on the part of defendants and of due care on the part of plaintiff might be drawn. This evidence must be said to have probative value on the question of whether or not the plaintiff was guilty of contributory negligence.

The testimony of defendants' witnesses with reference to the ringing of the bell and the blowing of the whistle was in direct conflict with that of plaintiff. The defendants also offered proof tending to show that if plaintiff had looked to his right, he would have seen the train. This conflicting evidence as adduced by the parties raised an issue of fact which the Trial Court properly submitted to the jury. Berg v. N.Y.C. R.R. Co., 391 Ill. 52; Gills v. N.Y.C. & St. L. R.R. Co., 342 Ill. 455.

Defendants contend there is no evidence in the record that plaintiff's intestate was in the exercise of due care for her own safety. There appears to be no dispute concerning the fact that plaintiff was the driver of and in charge of the automobile in which decedent was riding at the time of the accident. She was riding with plaintiff but was not exercising any control over the manner in which he operated the vehicle. The only direct evidence as to the conduct of the decedent prior to the collision, is plaintiff's testimony that as he straightened the car out into 11th Street to cross the second railroad track, decedent hollered "Watch out, Dad", and that at that time the train was crashing into the car. It is thus apparent that decedent did see the train before the collision and warned plaintiff of the danger which she observed, but that it was then too late for him to avoid the crash which followed. It must, therefore, be said that there is some evidence tending to prove due care on the part of the decedent. The question whether she should have observed the train sooner was for the jury to determine, and in doing so to consider plaintiff's testimony and all other facts and circumstances bearing upon that issue as shown by the evidence. In the instant case the jury resolved such issue in favor of the plaintiff. On the record before it, this Court would not be warranted in

holding that such finding is entirely without support in the evidence.

The remaining ground upon which the defendants base their claim that the judgment should be reversed is that the verdict is manifestly against the weight of the evidence. Such argument can only prevail if the jury verdict is palpably erroneous. Where there is substantial evidence in the record supporting the verdict, a reviewing Court is not at liberty to set the same aside and substitute therefor its judgment on the facts. Seiden v. Kolarik, 350 Ill. App. 238; McMillian v. McLane, 338 Ill. App. 514; Alden v. Coultrip, 275 Ill. App. 306. In the instant case as hereinabove pointed out, there was conflicting evidence before the jury on the issue of the negligence of the defendants and the contributory negligence of the plaintiff and his intestate. Whether defendants were negligent in the operation of the train in failing to give warning of the approach thereof by sounding the bell and whistle 80 rods from the crossing, in failing to have the headlight operating, in running the train at an excessive rate of speed under the circumstances shown to have then existed at the crossing were all questions of fact. Likewise were the issues as to whether plaintiff looked for approaching trains before entering upon the crossing and as to whether under the conditions prevailing at the crossing the care which he exercised for his own safety was that of a reasonably prudent person.

What is required of a person in the way of exercising due care in crossing railroad tracks depends upon the circumstances of each case and the Courts cannot say as a matter of law that there is a particular rule of conduct applicable in each case and under all conditions. Applegate v. Chicago & N.W. Railway Co., 334 Ill. App. 141.

It was the province of the jury to determine these several fact questions from the evidence. The record in the instant case refutes any contention that the verdict is not supported by substantial evidence. Therefore, this court would not be justified in setting such verdict aside upon the ground that it was against the manifest weight of the evidence.

For the reasons herein indicated, we are of the opinion that the Trial Court did not err in ruling adversely to the contentions of the defendants as made on this appeal, and its judgment should be affirmed.

Affirmed.

It was the province of the jury to determine these several fact questions from the evidence. The power to [illegible] the [illegible] of the [illegible] conclusion that the warrant is not supported by [illegible] evidence. Therefore, this court [illegible] [illegible] [illegible] radio upon the premises [illegible] [illegible] evidence.

[illegible]

[illegible]

OK. Wolfe

3743 A

General No. 106 9 Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

October Term, A. D. 195[illegible]

SERVISOFT INC., a Corporation, Plaintiff-Appellee, vs. LeROY C. LIND, Defendant-Appellant.	Appeal from the Circuit Court of Winnebago County.

12 I.A.1

Dove, J. J.

Servisoft, Inc., instituted this action against LeRoy C. Lind to recover royalties alleged to be due it under a licensing agreement dated January 1, 194[illegible] which it had entered into with the defendant and by which the plaintiff granted to the defendant the sole and exclusive right and license to supply Soft Water Service and the use of its existing water softening patents and to use its trade name in a certain prescribed territory in consideration of which defendant agreed to make stipulated royalty payments to the plaintiff.

The defendant admitted the execution of the contract but alleged in his answer that in January, 1949, the plaintiff discontinued furnishing him equipment for use in supplying the

patented water softening apparatus which the plaintiff, by the licensing agreement, had agreed to furnish. The defendant also filed a counterclaim consisting of two counts, the first of which alleged that the plaintiff breached its contract when it discontinued furnishing the equipment to the plaintiff required by the licensing agreement and that the failure to furnish the necessary equipment caused the equipment owned by the defendant to become obsolete and of diminished value. The second count of the counterclaim alleged that plaintiff's failure to furnish the equipment called for in the contract reduced the value of defendant's soft water franchise in the sum of $5,000.00.

The issues made by the pleadings were submitted to the court for determination without a jury. Upon the hearing the evidence disclosed that the amount of royalties due under the agreement, was $3,827.35, and it was for this amount that the court rendered judgment in favor of the plaintiff on its claim for unpaid royalties and upon the counterclaim of the defendant the court found the issues against the counterclaimant on both counts and entered judgment accordingly. The defendant appeals.

Appellant contends that the evidence discloses that appellee breached its agreement by abandoning the subject matter of the contract, by failing to furnish the agreed equipment necessary to the operation of the soft water system and by failing to furnish the agreed materials and equipment at prices stipulated in the contract. Appellant also contends that appellee exercised its option to terminate the contract according to its terms and that after such termination no further royalties or license fees

accrued by virtue of the terms of the agreement.

The record discloses that appellee is a Corporation and the owner of certain Water Softening patents which it grants various individuals and corporations to use. Glen Ralston was its president and appellant, LeRoy C. Lind was, at the time of the execution of the contract which forms the basis of this suit, and until September 1949 its vice-president and took an active interest in its affairs, had charge of its development and research, was familiar with all of its transactions and helped develop its policies. Shortly after September 1949 appellant went into the Water Softening business himself using a non-patented process. The contract executed by the parties hereto granted to appellant the sole and exclusive right to use appellee's patents and trade name in supplying soft water service in the territory set forth in the agreement upon the payment by him of certain fees and royalities set forth in the contract. The licensee had the right to terminate the agreement under certain conditions upon giving sixty days' notice of his intention to cancel the agreement, and the company had a similar right of termination upon giving a sixty-day notice.

Paragraph 12 of the contract, which is the principal one that appellant alleges that appellee breached and thereby gave him the right to discontinue paying license fees, provided that the appellee was to furnish to the licensee, equipment for use in supplying the patented water softening apparatus and soft water service at prices enumerated in Schedule A, which was attached to the agreement and made a part of it. Schedule A

contained three items; namely, (1) Servisoft unit (a tank-like bag); (2) Zeolite Mineral; and (3) cloth bags. It is the first and third items which appellant asserts that appellee did not furnish him as required by the agreement and which gave him the right to refuse to pay the royalties. According to the schedule the price of the Servisoft unit was $18.50 and cloth bags were to be furnished for fourteen cents each.

Appellant claims that appellee failed to furnish him cloth bags as required by the licensing agreement. The preponderance of the evidence shows that there never was a time when appellant ordered any such bags which appellee did not furnish. By the terms of the agreement, appellee was required to furnish such bags only after receiving an order for the same by appellant. Before there can be any damage to appellant for failure to furnish bags, he must first show that he ordered bags which appellee failed to furnish him. There is no such showing in this record. In the latter part of the year 1948, the management of appellee company came to the conclusion that it was necessary to adopt a different type of tank for use in the soft water business. It was decided that the bag-type tank (the kind then being used by appellee and which contained the water softening material) was obsolete by virtue of the development of a metal tank known as the M-24 and which was a carry-in type tank similar to that used by the Culligan System of water softening but much lighter in weight. Appellant particularly liked the M-24 tank and decided to use it wherever possible. From the time that the M-24 was available, appellant never ordered any of the old bag-type of tank and, therefore, he cannot complain of appellee's failure to furnish

him with the material and equipment referred to in schedule A and called for under paragraph 12 of the contract.

Appellant also claims that appellee breached its contract by charging him higher prices from and after the year 1947 for the bags furnished him under the licensing agreement. Just what bags and how many were furnished appellant after that date, the evidence is meager and indefinite. It does show, however, that appellant paid the price of the bags he did receive voluntarily and without complaint, and it also appears that during this time he, as an officer of the corporation, directed the increase in the price of bags in 1947. He thus waived any right he otherwise might have had to rely upon the price stated for material and equipment furnished under the licensing agreement. (Evans v. Hosell, 211 Ill. 85; Chicago & Eastern R.R. Co. v. Moran, 187 Ill. 316.)

Appellant, after his claimed breach of the contract by appellee, continued to accept performance of the contract and to have the benefits thereof. This, in law, is an election to continue the contract and has the legal effect of discharging any claim for breach of the same. (American S. & G. Co. v. Chicago G. Co., 184 Ill. App. 349; Noble v. Illinois Central R.R. Co., 111 Ill. 467.) When the prices of bags and tanks were raised in 1947, appellant continued to pay for the bags and tanks without objection and treated the contract as in force. In order to be in a position to take advantage of any breach of contract, appellant should have objected at the time of the increase. He cannot voluntarily participate in increasing

prices, pay such increased prices, continue the contract in effect, and then several years later be permitted to successfully interpose such increase in prices as a breach of the contract and afford him an excuse for not paying for the benefits which he received under the licensing agreement.

The licensing agreement gave the appellee the right to terminate the agreement by giving written notice of such termination to the licensee if the licensee failed to make the royalty payments due under the agreement, or if he abandoned the business, or if he failed to maintain a suitable place of business. The notice of termination was required to be sent by registered mail to the licensee's place of business and upon the expiration of sixty days following the giving of notice, the agreement terminated unless the default was cured in the meantime. On July 11, 1950, appellant received a letter from the appellee, sent by registered mail stating," Unless the Monies overdue us under paragraph 5 of a certain license agreement entered into between you and Servisoft, Inc. on the 1st day of January, 1944, have been paid by September 8, 1950, it will be necessary for us to institute suit for collection of those monies and it will also be necessary for us to cancel that license agreement unless the default shall have been cured by the above mentioned date."

Appellant contends that this registered letter was a termination notice and that, therefore, no royalties could accure under the licensing agreement from him to the appellee after the giving of this notice. Appellee contends that this letter was merely notice of a threat to terminate and that it

was but a warning that the contract would be terminated if the defendant didn't pay. The only reasonable meaning that can be given to this notice is that it was a statement of intention to sue and to terminate the contract in the future if the appellant did not pay the amount due the appellee. It was not a notice of termination.

The learned and experienced trial court correctly decided the issues presented by the pleadings in this case. The allegations of the counterclaim are not sustained by the evidence. The judgment appealed from is therefore affirmed.

Judgment affirmed.

3753 A

General No. 10695 Agenda No. 5

IN THE

APPELLATE COURT OF ILLINOIS

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SECOND DISTRICT

- - -

October Term, A. D. 1953

ABNER JOHNSON, Plaintiff-Appellee, vs. WILLIAM SPINHIRNE, Defendant-Appellant.	Appeal from the Circuit Court of Stephenson County.

12 24 189

Dove, J.

On June 14, 1952, appellee, a tenant on the farm of appellant, filed his five-count complaint in the Circuit Court of Stephenson County seeking, by one count of the complaint to recover a money judgement against appellant for a breach of an oral contract by the provisions of which appellant rented to appellee a dairy farm. By another count of the complaint appellee sought to recover damages for an alleged slander and by another count he sought a cancellation of the verbal lease. By the other counts he sought an accounting and the appointment of a receiver to operate the farm. Appellant was duly served with process, employed counsel and filed a motion to dismiss the complaint.

Pending a hearing upon the motion to dismiss, the parties, on October 23, 1952, entered into an agreement

in open court which purported to settle all of the rights of the parties and which required certain things to be done by the parties and the payment of $687.35 by appellant to appellee. This agreement omitting the caption and the signatures of the parties is as follows, viz:

"It is agreed by and between the parties hereto in open court that as a full settlement of all rights, claims and demands of every kind and nature which plaintiff had against defendant and defendant has against plaintiff by reason of the subject of this litigation or any other subject, shall be settled in full in the following manner:

"(1) The corn now on the premises owned by William Spinhirne and occupied by Abner Johnson is to be picked by William Spinhirne or others selected by him at the usual rate for corn picking in the vicinity and all the corn shall be hauled and put into the cribs on the premises until the cribs are filled and the excess shall be placed under cover if possible on the premises.

"(2) Each party is entitled to half of the corn harvested and the division shall be on as equal a basis as possible, having regard to possible differences in quality between various parts of the fields.

"(3) In order to make division as accurate as possible, the wagon loads shall be counted and the cubic content of the wagons used shall be computed, for an average sized load, and each party is entitled to use any other method of measurement for his own satisfaction that he may deem necessary or desireable.

"(4) Each party is entitled to be present at all times while the corn is being picked, divided and stored, or to have a representative present at his own expense.

"(5) When the corn shall all have been harvested there shall be paid by Johnson to Spinhirne $322.67 in cash, or in corn, at its market value as determined by elevator prices on November 1, 1952, at the Shannon, Illinois, elevator for corn of similar quality and moisture content.

"(6) Johnson shall also pay the cost of picking the corn and hauling it to the building and putting it in the cribs, either in cash or by corn, figured on the same basis as above.

"(7) Johnson agrees to vacate the premises on or before Monday, October 27, 1952, leaving the premises in as good condition as it now is.

"(8) Spinhirne agrees to pay the sum of $1000.00 to Johnson as follows: $300.00 today, receipt of which is hereby acknowledged, and the balance of $700.00 payable when Johnson vacates the premises, less deduction of the amount Spinhirne shall have paid or be obligated to pay, for the telephone bill chargeable during 1952 for the premises to the date of the vacating.

"(9) Upon an agreed division of the corn in halves, after Johnson has paid, either in cash or by corn as above provided, the cost of picking, transferring to the crib and the said sum of $322.67, the corn which Johnson has remaining shall then be valued at the November 1st market price as aforesaid. If the same is valued at $1000.00 or less, all of

the corn, that is both halves, shall become thereby the property of Spinhirne; if such value of the Johnson half as aforesaid shall exceed $1000.00, said Johnson may have as his property such excess corn to do with as he sees fit, in any event the same to be moved from the premises within thirty days after picking is completed.

"Upon final settlement, pending suit shall be dismissed at plaintiff's costs."

The record further discloses that on December 2, 1952, appellee filed in the circuit court his verified petition which recites:

"1. That on the 23d day of October, 1952, a stipulation was entered into as the result of a pre-trial conference held before the Hon. Harry E. Wheat, Circuit Judge, in which William Spinhirne, the defendant, agreed to pay the plaintiff the sum of One Thousand Dollars, of which $300 was paid that date and he has not paid the balance of $700, less a telephone bill, of $12.65 to be deducted, or a total amount of $687.35.

"2. The Plaintiff has demanded said sum through counsel for the defendant, and the defendant has failed to pay the same.

"3. That the defendant should be ruled to show cause why he should not pay said sum of $687.35 as stipulated and ordered by this court or be held in contempt of this court for failure to pay the same."

The prayer of the petition was that the court hold a hearing and determine the facts, and if it finds that the defendant was in default in not paying said sum of $687.35 as stipulated, that the court enter a rule against the defendant

requiring him to show cause why he should not be held in contempt of court and punished accordingly.

Upon notice to appellant and after a full hearing, an order was entered by the circuit court on January 16, 1953, which, omitting the caption and signature of the presiding judge, is as follows, viz.:

"And now this cause coming on to be heard upon the Petition of Abner Johnson, the Plaintiff, and upon a settlement agreement made and entered into between the parties Abner Johnson and William Spinhirne on the 23d day of October, 1952, whereby under the authority of this court, the parties compromised their claims into certain liquidated payments which became a final settlement and disposition of the case and on said date said settlement was accepted by the order of this court as a disposition of the cause, but under the jurisdicition of the court for enforcement of said settlement and compromise. The court finds that the defendant William Spinhirne now wilfully refuses to pay the said Abner Johnson the sums due under said compromise and settlement in the amount of $687.35 after all due credits and that said Abner Johnson complied with said compromise and removed from the premises as he agreed.

"The court finds that said William Spinhirne is before the court and has failed to give good and valid excuse for his failure to pay said sum of $687.35 to Abner Johnson in accordance with the terms of said stipulation and compromise agreement and should be required to make such payment.

requiring him to show cause why he should not be [illegible]
contempt of court and punished accordingly.

Upon notice to the [illegible] an order was entered by the circuit court on [illegible] 1889, which, omitting the formal parts, [illegible] stating judge, is [illegible]:

"[illegible]

"The court finds that said William Spinhirne should be required to show cause by a short date why he should not be held in contempt of this court for his failure to pay said sum on October 28th, 1952, as agreed and stipulated, and unless he can show such good and sufficient cause to this court, he should, upon his failure to pay said sum of $687.35, be committed to imprisonment until he purges himself of his contempt of this court.

"The court finds that said William Spinhirne had failed to show any cause for his failure to pay said sum due to said Abner Johnson to date.

"NOW THEREFORE, IT IS HEREBY ADJUDGED AND DECREED that the said William Spinhirne is ruled to show cause, if any he has, by a short date, said date to be 10 AM, January 23d, 1953, why he should not be punished for contempt of this court for his failure to abide by the terms of the compromise and settlement of this cause as made in open Court on the 23d day of October, 1952, for his failure to pay the plaintiff, Abner Johnson, the sum of $687.35; that said sum shall be paid to the Clerk of this court by 10AM, January 23d, 1953, or good and valid cause shown this court why he should not pay the same by said time and date, and upon his failure to do either, he shall be punished for contempt of this court. The court retains jurisdiction of the parties and subject matter for the purpose of enforcement of this decree and continues to hold jurisdiction of the parties and subject matter to enforce the settlement agreement as made in open court."

Thereafter appellant filed his unverified motion to vacate the order of January 16, 1953, on the ground that the order was not in accordance with the agreement of October 23, 1952; that it attempted to imprison appellant for a debt and that no hearing had been held on the question of the performance of the agreement of October 23, 1952. Upon a hearing, participated in by counsel for both parties, this motion was sustained in part and on February 20, 1953 an order entered which recited that all the parties were present in open court and that from the statements, confessions and admissions made in open court, the court found that the defendant confessed that he owes the plaintiff the sum of $687.35. This order then continues:

> "THEREFORE IT IS CONSIDERED BY THE COURT that plaintiff do have and recover, of and from defendant, by and upon the confession of the defendant, the sum of Six Hundred Eighty-seven and 35/100 ($687.35) Dollars, together with his costs and charges in this behalf expended, and have execution therefor." To reverse this judgment the defendant prosecutes this appeal.

It is true, as counsel for appellant state, that a judgment based on findings not supported by the record or by any competent evidence cannot be sustained and will be reversed. The record in this case discloses, however, that the parties to this proceeding fully settled their differences and entered into an agreement in open court defining the rights and obligations of the parties to that agreement and providing for a dismissal of this suit. Among the obligations assumed by appellant was to pay to appellee $687.35. The plaintiff below verified the

petition which was filed on December 2, 1952 and that verification stated that the sum of $687.35 was due him by reason of the stipulation of the parties and that said sum so due had not been paid. No answer appears to have been filed by appellant to this petition, but the record shows there was a hearing, participated in by appellant and his counsel, and that thereafter upon his motion the order of January 16, 1953, was modified by the order entered on February 20, 1953. The allegations of the verified petition filed by appellee on December 2, 1952, were never denied by appellant and no reason was ever advanced by appellant in the trial court or in this court why he should be excused from complying with his agreement entered into in open court on October 23, 1952. In the absence of any denial of the averments of the verified petition of appellee, certainly the trial court was justified in rendering the judgment it did, and that judgment will be affirmed.

Judgment affirmed.

O.K.
Wolfe

3763 A

General No. 10690 Agenda No. 18

IN THE

APPELLATE COURT OF ILLINOIS

Second District

May Term, A.D. 1953

OSCAR A. KIMES, Administrator of the Estate of Ralph Kimes, Deceased, Plaintiff-Appellant, vs. GLENN BURKHART, Defendant-Appellee.	Appeal from the Circuit Court of La Salle County.

PER CURIAM:

Oscar A. Kimes, as administrator of the estate of his deceased son, Ralph Kimes, filed this suit seeking to recover from the defendant, Glenn Burkhart, the value of an automobile which belonged to plaintiff's intestate and also for his alleged wrongful death. The complaint alleged that decedent was driving his Merdury automobile in a northerly direction on State Highway No. 23 on May 15, 1950, and that defendant at the same time was also driving his Chrysler automobile in the same direction upon the same highway; that decedent was in the act of passing defendant's car and proceeding in the left or east traffic lane when the defendant suddenly and without warning turned his automobile to the left of the black center line in a northwesterly direction immediately in fromt of and across the pathway of the automobile driven by decedent which was approaching from the rear

and about to pass the automobile being driven by the defendant; that as a proximate consequence of defendant's negligence, the Kimes automobile struck the defendant's car and was thrown from the highway and, as a result thereof, plaintiff's intestate's automobile was wrecked and plaintiff's intestate thereafter ~~and on May 16, 1950, wrecked and plaintiff's intestate thereafter~~ and on May 16, 1950, died.

The complaint averred that decedent was in the exercise of due care upon the occasion in question and enumerated certain acts of negligence of the defendant. The answer of the defendant denied these allegations. The issues made by the pleadings were submitted to a jury resulting in a verdict finding the defendant not guilty. Amended motions for a new trial and for judgment notwithstanding the verdict were filed by the plaintiff, heard, and denied, and from a judgment on the verdict the plaintiff appeals.

The record discloses that between one-thirty and two o'clock on Sunday morning, May 14, 1950, decedent, unaccompanied, was driving his Mercury automobile in a northerly direction on State Highway No. 23 between Streator and Grand Ridge; that the defendant, accompanied by Dean Starks, Ann Gable, and Kathleen Gable, was also proceeding in a northerly direction in his Chrysler car along the same highway; that when the cars had reached a point some five miles north of Streator the Kimes car, in attempting to pass the Burkhart car, came in contact with a portion of the Burkhart car causing the decedent to lose control of his car, which finally came to rest in a nearby farm yard. As a result of this unfortunate occurrence, decedent was fatally injured.

Upon the trial the plaintiff called the defendant as an adverse witness under Section 60 of the Practice Act, and he testified that he was twenty-one years old and as he proceeded north on the evening in question he was driving about 45 or 50 miles per hour and had been following another car for a half mile; that he looked in the rear-view mirror, saw no car, and then pulled across the center line a foot or more to the left to see what was ahead of this car; that he noticed a gradual incline and pulled back into his traffic lane, and as he did so he noticed car lights coming up real fast behind him, and it was at that time that the left rear fender of his car was hit by the Kimes car; that when he was so hit his car was on the east side of the black center line. At the time the Kimes car passed him, this witness stated that in his judgment it was going between 90 and 100 miles per hour.

Raymond Delahanty testified on behalf of the plaintiff to the effect that upon the occasion in question he was driving north on this highway and when he had proceeded to a point about three miles north of Streator he noticed the defendant's car about one-half mile ahead of him, and also, observed at the same time the car driven by the deceased which was then approaching from the rear and about one-half mile behind him. This witness testified that he was alone in his car and that after the Kimes car passed him he observed that it traveled "well on its own side of the road and under dontrol." As abstracted, this witness then continued: "It was on the West side of the black line. . . . . As the Kimes car approached the Burkhart car. . . . . and was attempting to pass it, the

Burkhart car swung to the left side of road two feet. The right front fender of the Kimes car then hit the Burkhart car. At the time of the impact, the Burkhart car was on the west side of the road about two feet. After the impact, the Kimes car went around the Burkhart car which pulled to the right side of the Burkhart car. After the impact, the rear of the Kimes car skidded on the West shoulder, then crossed in front of Burkhart's car on the right shoulder and then went back to the left side and landed in the Snyder front yard."

On cross examination, this witness testified that he first became aware that the Kimes car was behind him when he started to slow up for the Burkhart car as it was ahead of him. The Kimes car, according to this witness, was traveling between 65 and 70 miles per hour as it passed him and he knows that because he looked at the speedometer.

Ann Gable, a passenger riding in the Burkhart car, testified on behalf of the defendant and corroborated the testimony of the defendant. She stated that she was eighteen years of age and that the car in which she was riding followed another car for about one-half mile; that the Burkhart car attempted to pass the other car and pulled across the black line and after they swung back in their own traffic lane, she felt a jolt and the Kimes car went past them and passed the car ahead, then to the right shoulder and back across the pavement coming to rest in a farm yard. She testified that she did not hear the sound of any horn.

Dean Starks testified that the Kimes car hit the Burkhart car as the Burkhart car was pulling back in its own traffic lane and was not sure whether the Burkhart car was

Burkhart car swung out [illegible] in front fender of the [illegible] the time of the [illegible] on the road about [illegible] went around the [illegible] of the Burkhart car [illegible] car left [illegible]

Burkhart's [illegible]

left [illegible]

[illegible]

struck [illegible]

The [illegible]

[illegible]

because [illegible]

[illegible]

testify [illegible]

copy of [illegible]

of [illegible]

[illegible]

[illegible]

The [illegible]

the fire [illegible]

the right [illegible]

in a [illegible]

of the road.

[illegible]

Burkhart [illegible]

traffic law [illegible]

entirely in its own traffic lane when he "heard a bang and the Kimes car went around them and the car ahead, then it went to the right shoulder and then back across to the left into Snyder's yard."

Kathleen Starks testified that near the Snyder farm there was a car ahead of the Burkhart car, and as Burkhart pulled back into his traffic lane, she heard a thud, and the Kimes car went past the car in which she was riding and also the car immediately ahead of the Burkhart car.

In rebuttal, Louis Washileski testified that he was a state police patrolman and on May 14, 1950, went to the scene of this accident, arriving there five or ten minutes thereafter; that in Snyder's farm yard he had a conversation with defendant in which the defendant told him that at the time fo the accident he was one or two feet over the center line of the pavement. Leo Gauvreau also testified in rebuttal to the effe t that he was a highway policeman, received a report of this accident and went to the scene thereof, and that the defendant then and there told him that his car was about one foot over the center line of the highway at the time of the collision.

It is first insisted by counsel for appellant that defendant's counsel was guilty of prejudicial misconduct in the manner in which he cross-examined ~~two~~ two witnesses who testified on behalf of the plaintiff, Raymond Delahanty and Louis Washeleski. During the course of the cross-examination of Delahanty, counsel for defendant asked him if it wasn't true that as he approached the scene of the accident he was driving one hundred miles an hour and questions of similar import concerning the speed he was

driving his car prior to the accident and for a distance of some two and one-half miles back. Objections to these questions were sustained by the court on the ground that the speed at which the witness was traveling at a point two and one-half miles distant from where the accident occurred was too remote, Counsel persisted in asking the same or similar questions after the objections had been sustained. Counsel also asked Delahanty this question: "Didn't you tell me yesterday you were traveling eighty miles an hour when the car went by you?" and the defendant answered, "No, I didn't." Counsel for defendant then asked this witness: "On the way out of Streator, didn't you pass the Kimes automobile?" An objection was interposed, and counsel for defendant then said: "The reason for it is I want to show these men were racing." The court sustained the objection. Counsel for defendant also offered in evidence a document which was marked Defendant's Exhibit 3, 3a, and 3b, which purported to be a statement which someone took from the witness Delahanty shortly after the accident occurred. Counsel asked Delhanty several questions concerning this written statement. One of the questions was: "After having read that (referring to this exhibit) you still want to tell this jury the Mercury, that Mercury that went by you, the Kimes car, wasn't going at least 100 miles per hour when this accident happened?" An objection to this question was sustained. During the cross-examination of this witness he denied making several statements which appeared in this exhibit, but counsel for defendant never called the person who took this purported statement but offered the exhibit in evidence. An objection thereto was sustained, and the exhibit was never received in evidence.

The plaintiff's witness, Louis Washeleski, a police officer, was asked on cross-examination concerning his testimony given at the inquest over the body of Ralph Kimes, the deceased. Another officer by the name of Gauvreau also testified at this inquest. The coroner asked Gauvreau this question: "You feel there was no party at fault?" and Gauvreau told the coroner that he felt nobody was at fault. The witness Washeleski told the coroner that his testimony would be the same as that of Officer Gauvreau. At the trial, counsel for defendant inquired of Washeleski if this question were asked him by the coroner: "You feel there was no party at fault?" and if he didn't answer that he felt no one was at fault. This question was objected to for the reason that it called for a conclusion and an opinion and that it invaded the province of the jury. The objection was sustained, but counsel persisted in asking the same question in one form or another, on the ground that he was laying the foundation for the impeachment of this witness. The question obviously called for a conclusion and was not admissible, and the mere fact that the witness had given an opinion as to whose fault the accident was at the coroner's inquest didn't make such testimony, even for impeachment purposes, admissible at the trial. Counsel also asked this question of Washeleski: "Well, after you got through with your investigation, you thought it was a plain accident, didn't you?" An objection to this question was also sustained. These questions were clearly improper and should not have been asked, and, in a case where the record otherwise warranted it, we would be required to reverse

the judgment. (Bishop v. Chicago Junction Railway Company, 289 Ill. 63, 68; Chicago and State Line Railway Company v. Kline, 220 Ill. 334, 338; Gordon v. Checker Taxi Co., 334 Ill. App. 313.)

The plaintiff also complains of certain rulings of the court pertaining to the admission of testimony which he offered. The rulings complained of are with reference to the testimony of police officer Louis Waseleski, who was called by the plaintiff as a rebuttal witness. He testified that he arrived at the scene of the accident some five or ten minutes after it happened and that he talked to the defendant concerning the accident. This question was then asked him: "What did he tell you about this accident." Counsel for the defendant objected on the ground that there was no foundation laid to impeach the defendant. The court said: "You will have to ask him an impeaching question." The witness then stated that he talked to the defendant in Snyder's farm yard and that the defendant made a statement as to what happened in this accident. Plaintiff's counsel then asked him: "What did he tell you?" The defendant again objected,,and the court stated: "Sustained-you must impeach with something said." Whereupon, counsel asked: "Mr. Washeleski, did Mr. Burkhart at that time and place, tell you that he was on the West side of the black line at the time of the accident?" Washeleski answered "Yes." Objection by the defendant, because of no foundation for the question, was overruled. Washeleski then testified that he had a conversation with the two girls who were in the defendant's car. Plaintiff's counsel then asked him this question: "And did these girls make the statement to you ---?" Whereupon defendant's counsel said, "Wait a minute--I object to that form of question--", and the court said, "No, you can't ask that--." Counsel then asked: "Did one of these girls or both of them make the statement

that they didn't know what happened?" The court sustained the objection to this question. The witness then pointed out the two girls in the courtroom as being the ones to whom he talked at the scene of the accident, and stated that both of these girls made a statement to him as to what they knew about the accident. Whereupon, this question was asked of the witness by plaintiff's counsel: "What was that statement?" The question was objected to as being asked without a proper foundation having been laid, and the objection was sustained. It is our opinion that the court properly sustained this objection for the reason that this witness should have been asked if these girls didn't make to him at the time and place in question the following statement: ". . . . .," a direct quotation of the witness. The question, as asked by counsel, was much too broad and not necessarily impeaching in character. As to the question, "Did one of these girls or both of them make the statement that they didn't know what happened?", we believe that the court should have overruled the objection to this question, although the question is not very skillfully phrased. It would have been much better if it had been put in the form of a direct quotation of the witness.

It is also argued by counsel for the plaintiff that the court gave an excessive number of instructions on behalf of the defendant. No complaint is made that the instructions so given did not state correct propositions of law, but merely that too many were given. A total of thirteen instructions were given for both sides. Neither the abstract nor the record shows how many or which instructions were given on behalf of the plaintiff or how many or which were given on behalf of the

defendant. In view of this fact, we cannot consider the alleged error in the giving of these instructions. (Chicago v. Callender, 396 Ill. 371, 382; Dorgan v. Graeber, 335 Ill. App. 503, 504; Seeden v. Kolarick, 350 Ill. App. 238.

We have carefully considered this record. It is not wholly free from error, but a majority of this court feel that the plaintiff has had a fair and impartial trial and that the jury were warranted in returning the verdict it did. We do not approve of the conduct of counsel for appellee, but in view of the rulings of the trial court a majority of the court do not feel justified in disturbing the verdict of the jury which has had the approval of the trial judge. The judgment of the Circuit Court will therefore be affirmed.

Judgment affirmed.

defendant. In view of this fact, we cannot consider the alleged error in the giving of these instructions. [illegible] v. Gallendor, 395 Ill. 377, 382; [illegible] v. [illegible], 125 Ill. App. 501, 504; Seeden v. Kolarick, 35[illegible] Ill. App. 234.

We have carefully considered this [illegible]. It is not wholly free from error, but a majority [illegible] that the plaintiff has had a fair and impartial trial [illegible] were warranted in rendering the verdict in [illegible]. We not approve of the conduct of counsel for appellee [illegible] view of the evidence or the trial court the majority [illegible] do not feel justified in disturbing the verdict [illegible] will be and the approval of the trial judge [illegible] of the Circuit Court will therefore be affirmed.

[illegible] a [illegible].

77 A

46185

IDA TESTO, Appellant,	)	
v.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
ALDA DI MAYO and GENUVINO V. DI MAYO, Appellees.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This was an action to recover $1150 on two promissory notes executed by defendants. The defense was lack of consideration and duress. A jury was waived and the case was tried by the court, which rendered a finding for defendants, upon which judgment was entered. It is from this judgment that the appeal is taken. While Ida Testo is the nominal plaintiff in the case, the real party in interest is her husband John. John Testo lives in Gary, Indiana, and is the business agent of the Terrazzo Tile & Marble Workers Union, Local 101. Alda Di Mayo, defendant, is the owner of the American Terrazzo Company. She lives in Chicago. The other defendant, Genuvino V. Di Mayo, is her brother and is employed by her.

According to plaintiff's testimony, James Di Mayo, father of the two defendants, borrowed money from John Testo and gave his notes therefor. The father died December 10, 1949 and on the same day John Testo saw Alda Di Mayo and her brother and told them of the two notes their father had executed. He testified that the defendants told him they had money in the bank but could not draw it, presumably because of the father's death (Alda Di Mayo owned the busi-

ness and had power to sign checks); that the bank wanted a receiver for the company; that defendants wanted to give him new notes right away and that when they had given him the new notes, he destroyed the notes given by the father; that after this was done, they went to the bank and John Testo said he would "stand behind the girl," meaning Alda Di Mayo. This is the story told by John Testo and it is corroborated to some extent by his wife Ida, although she did not remember whether they gave the old notes to the defendants or whether they destroyed them themselves.

Defendants' story is quite different. According to Alda Di Mayo, at the time in question her company was doing work pursuant to a subcontract on St. John The Baptist School at Whiting, Indiana, five miles from Gary. Her brother worked for her. She knew John Testo as the business agent for the TerrazzoWorkers' Union. She knew nothing whatever of any debt owing by her father to Testo. The day after her father died John Testo called her and she went to his office. There he talked to her about the bank account and said that he would go to the bank with her and get the account straightened out so the workmen could be paid. They did so, and when she explained that she was the owner of the business, had the power to sign checks and had done so, the matter was settled and they went back to Testo's office. There, for the first time, Testo told her of her father's notes. She asked to see them and he said no. Under his threat to call off the

men and stop the job, she signed the new notes. Subsequently, Testo made a demand for some payment on the notes, with another threat that he would call his men off the job unless payment was made. She gave her brother a check for $200 to be delivered to Testo.

The principal point made by plaintiff is that the evidence did not preponderate in favor of defendants on their affirmative pleas of want of consideration and duress. We have examined the record and are convinced that there is ample evidence to support the finding of the court. It is urged as error that the trial court, at the conclusion of the case, asked the parties to submit to a lie detector test. He did this without any undue urging, but in the course of so doing said he "would just have to guess what took place between these people." This is assigned as error. Conclusions of the court are to be derived from the evidence and if we were to take literally the statement of the court that he would have to "guess," it would be error. In Fowler's "The King's English," 3d Ed., p. 33, the authors say: "If any one were asked to give an Americanism without a moment's delay, he would be more likely than not to mention I guess." The word "guess" does not necessarily mean conjecture, but may mean the formation of a reasonable opinion or conclusion or may be used as a synonym for "suppose," "believe," or "think." In Webster's Collegiate Dictionary, Third

Ed., Merriam Series, it is said: "This use of guess is now colloquial; its use (as often in the U.S.) where no uncertainty is involved is a vulgarism; as I guess I'll go to bed." It is in this general sense that the court used this language. He is an able and experienced judge and while he may have used what purists call a "vulgarism," we are certain that in arriving at his conclusion he weighed the evidence. We have read the record and have observed in it glaring inconsistencies and obvious improbabilities in plaintiff's story which undoubtedly were considered by the judge in arriving at his finding.

Judgment affirmed.

Robson, J., concurs.
Tuohy, J., took no part.

78 A

46297

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO CRIMINAL
v.	)	COURT, COOK COUNTY.
JAMES JACKS, Plaintiff in Error.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant was found guilty of assault with a weapon with intent to do great bodily harm and was sentenced to the County Jail for a period of six months and fined $50. The indictment contained three counts: (1) assault with intent to commit murder with a glass container; (2) assault with a dangerous and deadly weapon, a glass sugar container, with intent to inflict bodily injury; and (3) assault with a dangerous deadly weapon, a sharp instrument, with intent to inflict bodily injury. Two errors are relied upon by defendant--(1) that the evidence shows he was so intoxicated that he could not form intent; and (2) that the trial court did not apply correct law to the evidence.

The point made by the State, that the question as to the sufficiency of the evidence cannot be considered on review in the absence of a motion for a new trial and an order overruling the same appearing in the bill of exceptions, is well taken. People v. Marshall, 309 Ill. 122; People v. Kemp, 396 Ill. 578; People v. Gabrys, 329 Ill. 101; People v. Lehner, 335 Ill. 424; People v. Richardson, 391 Ill. 523. However, we have examined the evidence and it appears clear

that it was ample to support the finding. The defense of intoxication to the point where the defendant was incapable of forming a specific intent to commit the crime, is an affirmative one and is to be proved as are other issues of fact. People v. Cozzie, 397 Ill. 620.

The victim was the manager of a restaurant at 4153 South Halsted street, Chicago. The assault, which occurred at 6:00 A.M., on November 4, 1952, was unprovoked and inflicted serious injury upon him. It appears that the manager found defendant asleep in the restaurant; that he let him sleep for an hour or so and then awakened him; that defendant asked to be served; that the manager told him he had trouble awakening him and that if he stayed, he would only go back to sleep and told him to take a walk out; that thereupon, defendant called him a vile name, picked up a sugar bowl, chased the manager out of the store and threw the bowl at him, hitting the back of his head and causing serious injuries. Defendant's defense is that he only remembers waking up in the restaurant and asking the manager for coffee; that he remembers the manager's telling him that he could not have any and that he said to the manager, "I have the money to pay for it." The next thing he remembers is a police officer's asking him "Why did you hit the man with the sugar bowl?" The police officer who arrested the accused said that while the man had been drinking, he was not intoxicated. The manager and four witnesses testified

for the prosecution. From their testimony, it appears to us that the evidence overwhelmingly supports the finding.

The next point made by defendant is that the court did not apply the correct law to the evidence. This is based upon remarks of the court in which he appears to have been pondering over the guilt of the defendant on the first count which charged assault with intent to commit murder. Then referring to defendant's drinking, the court said of him that it was "very possible he was physically exhausted, he went to sleep, in other words, he couldn't form the specific intent, having been probably intoxicated so far as specific intent to murder is concerned. I would not find him guilty of intent to murder." If we read what the court said in its full context it is clear he was mercifully seeking some extenuating circumstances that would not make it necessary to find defendant guilty of intent to commit murder. The undisputed evidence shows the vicious assault to have been committed in a fit of ugly and uncontrolled temper.

Judgment affirmed.

Tuohy and Robson, JJ., concur.

79 A

46113

COSMO GAROFALO, Appellee,	)	APPEAL FROM SUPERIOR COURT,
v.	)	COOK COUNTY.
CHARLES M. D. VERNI, Appellant.	)	

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the trial court which approved the master's report finding a joint venture or partnership between plaintiff and defendant with respect to the purchase, operation and sale of an improved piece of property commonly known as 5119 West Diversey avenue, Chicago, Illinois, dissolved the partnership, and found that the defendant was indebted to the plaintiff in the sum of $2,364.01. Defendant contends that the plaintiff failed to prove the existence of a partnership or joint venture by a preponderance of the evidence; that if this court is of the opinion that the plaintiff did establish a partnership, defendant was entitled to a setoff of the sum found due in the accounting of profit from the sale of another parcel of real estate that plaintiff purchased from the defendant.

We will first consider whether the findings of the master, which were approved by the trial court, are against the manifest weight of the evidence. The version of the facts the court believed is that the plaintiff, a barber, and a man of limited education, entered into an oral agreement in July of 1947 with the defendant, who

was formerly connected with a bank, and who had broad real estate experience, for investment in a parcel of real estate on Diversey avenue. The parties were to share the profits equally. Defendant negotiated for the purchase of the property and plaintiff entered into a written agreement in August of 1947 with the owners for the purchase at a price of $20,500. After deducting proration credits the net amount paid was $19,622.52. Plaintiff paid the defendant $10,000 as his share and the defendant advanced the remainder of the net purchase price. At the direction of the defendant title was conveyed to the plaintiff. The parties retained the property until May 27, 1950, when it was sold for a price of $21,000. After necessary prorations the net amount received was $20,977.19. Defendant gave plaintiff $9,811 and retained the balance. The defendant had managed and operated the property from the date of purchase until it was sold. After the sale plaintiff made demands from time to time for an accounting of the rents and the balance of the sale price. Defendant promised that he would account, but never complied. On February 3, 1951 defendant in writing stated to the plaintiff: "I will soon have your account ready in order that the amount I owe you is duly paid in full." It was signed by the defendant. Plaintiff's testimony was corroborated by his wife and son, the latter of whom had been in the employment of defendant.

Defendant's version of the transaction is that

he had purchased the building for the plaintiff. Subsequently the plaintiff told him that his wife did not want the building, so that the plaintiff was withdrawing from the deal. The $10,000 paid by plaintiff was to be a loan to the defendant, to be repaid when the property was sold. Defendant at no time paid the plaintiff any interest on the $10,000. He said he felt he would reciprocate for this in some way. Defendant denied that the plaintiff had ever made any demands for an accounting, admitted the written statement of February 3, 1951, but made no explanation of it. No explanation was made by the defendant of the failure to pay the difference between $9,811 and $10,000. No witnesses corroborated the defendant's testimony.

Section 6 (1) of the Partnership Act (Ill. Rev. Stat. 1953, chap. 106-1/2, par. 6) provides:

"A partnership is an association of two or more persons to carry on as co-owners a business for profit."

In interpreting this provision it is the well-settled law of this State that where parties agree to engage in one or more particular transactions for the purchase and sale of real estate for profit, this constitutes a partnership as to the particular transaction or transactions. Harmon v. Martin, 395 Ill. 595, 611-2, and cases there cited. Such an agreement is not within the Statute of Frauds and may be entered into and become effectual, although not in writing. Harmon v. Martin,

supra.

The master found from the facts that a partnership existed. These findings were approved by the court. The rule is that a master's conclusions of fact when approved by the chancellor will not be disturbed on review unless manifestly against the weight of the evidence. Kane v. Johnson, 397 Ill. 112; McKey v. McKean, 384 Ill. 112; Pasedach v. Auw, 364 Ill. 491. We have examined the record and, applying the facts to the statements of law heretofore discussed, we are of the opinion that the plaintiff proved a partnership or joint venture in the Diversey avenue property by a preponderance of the evidence and that the master and the court were justified in making their findings.

Defendant's next contention is that if a partnership was found he is entitled to a setoff against the accounting for the sum of $1,500 that was due the defendant from the plaintiff on a parcel of real estate known as the Parkside avenue property. Defendant testified that he had taken a contract in July of 1947 in the name of his sister-in-law, as his nominee, for the purchase of this property for $10,500. He told plaintiff in 1949 that a Mr. Feinberg, attorney for the seller, had a party who agreed to purchase the property for $13,500 if the defendant would release the seller from the contract. Defendant said if the plaintiff would buy,

he would divide the profit and defendant would be entitled to $1,500. The plaintiff agreed to do this and took title to the property in September, 1949. Defendant's wife was supposed to have been present when the transaction was agreed to by plaintiff and defendant. Neither defendant's wife, Feinberg, nor the supposed purchaser, testified in support of defendant's contentions.

Plaintiff's version of the transaction was that defendant approached him about purchasing the property for himself and his wife. He at no time made any agreement with defendant that the property should be valued at $13,500 and pay defendant $1,500 as his share of the profit. An appraisal made for the Pioneer Bank to permit the plaintiff to make a mortgage showed the value in November of 1949 at $9,689. Plaintiff's testimony was corroborated by his son.

The master found against the defendant on the ground that defendant's contention was against the manifest weight of the evidence. This finding was approved by the trial court. We find no reason to change it.

The decree of the trial court is affirmed.

Decree affirmed.

Schwartz, P.J., concurs.

Tuohy, J., took no part.

80 A

46125

MEYER BARRON, Appellee,	)	
v.	)	APPEAL FROM SUPERIOR
EDWIN A. HOVORKA et al., Defendants below.	)	COURT, COOK COUNTY.
On Appeal of EDWIN A. HOVORKA, BETTY HOVORKA, H. PAUL SCHMIDT, LAURETTA SCHMIDT, Appellants.	)	

12 I.A.2d 283

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

This appeal presents the question which of two contending groups were legally elected as officers of the Mid States Chow Chow Club, Inc., a not-for-profit corporation incorporated in Illinois in 1927.

The Mid States Chow Chow Club numbered either nineteen or twenty-three members on December 20, 1951, all of whom were engaged in the breeding and rearing of chow dogs. On the above date plaintiff Meyer Barron was president of the club. A meeting was called by the secretary for the election of officers to take place on December 20, 1951 at the Atlantic Hotel in Chicago. The weather on that date was extremely inclement, a terrific snowstorm being in progress, and only nine of the members appeared. Thereupon president Barron announced that due to the inclement weather and the lack of a quorum the meeting was adjourned. Five of the nine present, however, refused to recognize the adjournment and proceeded to hold an election after the four had left. As a result the four

individual defendants and a Mrs. George Curzon (who is no longer a member of the club) were elected officers and directors and have since been recognized by the American Kennel Club as such.

Thereafter, on January 9th, president Barron issued a notice calling for the annual meeting and election to be held January 31, 1952, and at that meeting, attended by ten members, Barron was elected president, Lewis Wade first vice president, Eugine Zielsdorf second vice president, Mrs. Mabel Wade treasurer, and Mrs. Walter Petersen secretary. They also elected a board of directors.

Defendants' principal contention is that there was a legal quorum present at the December meeting and that the election there held was valid. Plaintiff disputes the fact that there was a quorum present and contends, furthermore, that the meeting of December 20, 1951, was illegal because the meeting was not called in the manner required by the by-laws. We deem it unnecessary to consider the question first raised for the reason that we are in agreement with the contention that the meeting of December 20, 1951 was not legally called. The by-laws of the club provide that the annual meeting be held in December at such time and place to be provided by the board of directors, that notice of the annual meeting shall be given to all members by the secretary fifteen days prior to the date of the meeting and that this meeting shall be held for the purpose of election of officers. Nowhere in the evidence before us does it appear that the

board of directors selected the time and place for the meeting to be held. On the contrary, it appears that the meeting was called by the secretary without any action whatsoever by the board of directors. In People v. Matthiessen, 269 Ill. 499, where a similar question was involved, the court said (pp. 503-505):

> "Section 6 of the act under which this company was incorporated provides that this meeting shall be held at such time and place as the board of directors may designate * * *. That notice is indispensable unless it is waived by all the stockholders, either expressly or by consenting to or participating in the meeting.
>
> "* * * This question arose in Charter Gas Engine Co. v. Charter, 47 Ill. App. 36, and the Appellate Court for the Second District, in an opinion written by a present member of this court, held that every stockholder had a right to be present at the annual meeting for the election of directors, and it could not be legally held until after notice of the time and place had been given in an authentic and legal mode, unless all stockholders were present and consenting, in person or by proxy. That holding is correct, and, as applied to the facts in this case, neither Mrs. Carus nor Lihme having consented to the holding of the meeting or participated in it in any way, the meeting of December 18, 1913, was not legally held and appellant has no valid title to the office of director of the company by virtue of any action taken at that meeting."

Defendant contends that if the meeting of December 20, 1951 was illegal, as called without compliance with the by-laws, then for the same reason the meeting of January 31st was illegal. The complaint alleges that the January meeting was called pursuant to the by-laws of the corporation. The answer denies that the meeting was called pursuant to the by-laws. The master found that the January meeting was legally called, and, as is apparent from a reading of the

decree, the chancellor adopted the master's finding in this respect. No evidence upon this contested issue of fact appears in the abstract, and it is to be assumed that the chancellor's finding was predicated upon credible evidence. Marine Trust Co. v. Reynolds, 308 Ill. App. 595.

It is difficult for us to find any substance that remains in this controversy. Since December, 1951 and January, 1952 new elections have been held which, it seems to us, have made this controversy moot. However, we have considered the points made by counsel and find the elections held at the meeting of December 20, 1951 were void. The decree of the Superior Court of Cook County is affirmed.

Decree affirmed.

Schwartz, P. J., and Robson, J., concur.

90 4

46245

MYRTLE M. NISBET, Appellant, v. GORDON A. WHITE, Appellee.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO, COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a proceeding to quash the return of a summons and vacate the subsequent default judgment. The trial court ordered the service of summons quashed and vacated the judgment. Plaintiff has appealed.

Plaintiff filed suit on January 21, 1953. An alias summons was returned indicating service on defendant on April 7, 1953 at 236 North Clark Street, Chicago. Default judgment was entered April 20th. On June 5th defendant's notice of motion to quash and vacate was filed.

In support of the motion defendant filed his own affidavit and the affidavit of John Monroe. Plaintiff moved to strike defendant's motion and supporting affidavits. This motion was denied, defendant's motion was sustained and the court ordered the issuance of an "alias" summons.

Plaintiff contends that the motion and affidavits were not sufficient to set aside the bailiff's return nor to give the trial court jurisdiction, more than thirty days after judgment, of a motion in the nature of a writ of error coram nobis.

Defendant's affidavit stated that he had no notice of suit until May 29, 1954; that he promptly discovered the return of the summons in the Municipal Court Clerk's Office; that the return was false; and that he has a good defense to plaintiff's claim. Monroe's affidavit stated that on April 7, 1953 a man inquired about defendant at the Clark Street address, was advised that defendant was not there, said he thought affiant was defendant, and sought to deliver "certain papers" which affiant did not accept. Plaintiff's motion to strike was on the grounds: (a) that Monroe's affidavit is negative in character and does not set forth facts of defendant's whereabouts; (b) that return of summons was conclusive after thirty days in the absence of fraud; and (c) that return cannot be set aside on uncorroborated testimony of the person named in the summons, but only on clear and satisfactory evidence.

We think that defendant's motion was the proper procedure for attacking the return. Ellman v. De Ruiter, 412 Ill. 285; Tomaszewski v. George, 1 Ill. App. 2d 22; Rule 21 of Municipal Court of Chicago. No objection was made at the trial that the defendant's motion was not in writing and the point therefore cannot be made here. Nor was plaintiff's motion to strike effective to raise any point with respect to lack of diligence or lack of a meritorious defense.

The return could not be quashed on uncorroborated testimony of defendant, but if it was clearly shown that defendant had not been served, the judgment was properly set aside. Nikola v. Campus Towers Apartment Bldg. Corp., 303 Ill. App. 516.

Plaintiff's motion admitted for the sake of the trial court's ruling that defendant was not served and also admitted the justifiable inference, that the bailiff mistook Monroe for defendant and sought to serve Monroe. In the absence of contrary showing, we think the admissions clearly establish failure to serve defendant. The admissions are not of statements of defendant only. He is corroborated by statements of Monroe. These considerations render Rosenthal v. Loeber, 305 Ill. App. 624, inapplicable. Had the trial court known when it entered the default judgment that defendant had not been served, the judgment would not have been entered. Defendant's motion, therefor, was properly sustained and the order entered the right order.

For the reasons given the order is affirmed.

ORDER AFFIRMED.

FEINBERG, P.J. AND LEWE, J. CONCUR.

46159

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Plaintiff - Appellee, v. JOHN O. WAGNER, Defendant below, THE WERNER STORAGE & TRANSFER COMPANY Garnishee, Defendant below. On Appeal of DAVID W. COLE, Intervening Petitioner below, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

David W. Cole, the appellant, hereinafter called the "intervenor," filed notice of appeal from a judgment entered against Esther Werner as garnishee, from an order denying the intervenor's claim to the property in the possession of the garnishee, and from certain other orders.

According to the record, judgment was entered "on answer" against the garnishee on June 21, 1950. June 14, 1950 the intervenor was given leave to file his interpleader in thirty days. The intervenor's petition was heard on August 18, 1950, and on that day, after a full hearing, the court found the issues against the intervenor.

The intervenor challenges the validity of the judgment entered against the garnishee on June 21, 1950. In his petition filed in 1952 to set aside the judgment and finding and later twice amended he

alleges in substance that the cause was set for trial on June 14; that, on the day preceding, plaintiff had the cause continued to June 21, when the judgment was entered against the garnishee; that the hearing on the intervenor's petition was set for August 1, 1950; and that on that day Judge Charles S. Dougherty, then a judge of the Municipal Court, vacated the judgment of June 21, 1950.

Plaintiff answered averring that the proceeding against the garnishee was on the trial call on June 13 and was continued to June 21, 1950, and that the intervenor knew that the cause was continued to June 21, the day on which the judgment was entered.

The intervenor insists that the order entered by Judge Dougherty vacating the judgment of June 21 was never set aside; that the garnishee never entered an appearance, and that the judgment entered against the garnishee was conditional.

The alleged order entered by Judge Dougherty does not appear in the record before us. When the intervening petition came on for hearing on August 1, 1950 more than thirty days had elapsed since the judgment was entered. Therefore Judge Dougherty had no authority to disturb the judgment if such was his intention. Intervenor's motion to vacate the judgment after the expiration of thirty days constituted a collateral attack. See Barnard v. Michael, 392 Ill. 130. Under a collateral attack every presumption is made in favor not only of the proceedings but of the court's jurisdiction unless it affirmatively appears on the face of the record

that the court was without jurisdiction. (Cullen v. Stevens, 389 Ill. 35.) The judgment entered June 21, 1950 imports absolute verity (Anderson v. Anderson, 380 Ill. 435) and could not be set aside by the alleged order of August 1st.

The garnishee admits that she was served with process and filed an answer in the garnishment proceeding, and that she had in her possession property belonging to the defendant Wagner. This constitutes an appearance by the garnishee thus giving the court jurisdiction of the parties and the subject matter.

The intervenor stipulated that in the event of an appeal to this court he would not raise the question of the date of entry of the judgment on June 21, 1950 against the garnishee, "in order to present the issues more clearly on appeal." In view of this stipulation intervenor waived his rights, if any, to question the finality of the judgment entered on June 21st.

Turning now to a consideration of the finding against the intervenor on August 18, 1950, the sole question determined under the issues made by the intervenor's petition and plaintiff's answer was whether the intervenor was the owner of the property described in the answer of the garnishee. This was a separate and distinct issue between the intervenor and the plaintiff and one with which neither the defendant Wagner nor the garnishee had anything to do. See Springer v. Bigford, 160 Ill. 495.

Garnishment is an ancillary statutory proceeding in the nature of process to obtain satisfaction of a judgment

rendered in the principal action. (Wieboldt Stores, Inc. v. Sturdy, 384 Ill. 271.) The garnishment proceeding is in the nature of a proceeding in rem. (Bowen v. Pope, 26 Ill. App. 233.) After service of the garnishment the property is regarded as in custodia legis, and the garnishee is considered a mere stakeholder. 38 CJS, sec. 185, p. 412. In the instant case the judgment against the garnishee was entered before the disposition of the intervenor's alleged claim. This though irregular, would not in our view justify a reversal of the judgment of June 21, 1950, since it appears that none of the parties were prejudiced. No action was taken to enforce the plaintiff's judgment against the garnishee before the intervenor's claim to the property in the hands of the garnishee was heard. The proceedings relating to the hearing of intervenor's claim on August 18, 1950 do not appear in the record except the finding of the court. In this state of the record we must assume that the evidence was sufficient to warrant the trial court's finding against the intervenor.

January 23, 1953 the garnishee filed a petition seeking to vacate the judgment of June 21, 1950 on the ground that Werner Storage & Transfer Company named as garnishee was not a corporation but merely the trade name used by Esther Werner doing business as Werner Storage & Transfer Company. Plaintiff answered that the summons had been served on Esther Werner personally; that her answer stated that the garnishee had possession of personal property belonging to defendant Wagner; and that the garnishee at no time objected to the form in which she was named in the garnishment proceedings.

After a hearing on February 13, 1953, the court ordered that the judgment be amended nunc pro tunc as of January 21, 1950, to read, "Judgment on garnishee's answer against defendant Esther Werner doing business as Werner Storage & Transfer Company, for use of plaintiff, special execution to issue."

Intervenor maintains that the garnishee named was legally nonexistent and therefore the entire proceeding is void ab initio, and relies on Lewis v. West Side Tr. & Sav.Bk., 377 Ill. 384, and Woerter v. Labowitch & Morris Disct. Serv., 348 Ill. App. 168. An examination of the facts of the cases last cited discloses that they are not sufficiently akin to the instant case to make them decisive of the issues here involved. In both cases partnerships were involved and no appearance or answer was filed as in the case at bar. Here the garnishee was doing business in the name in which she was sued and submitted to the jurisdiction of the court. Moreover the garnishee is not the principal defendant against whom the judgment is sought, nor does she claim any interest in the property in controversy. She is without fault or blame but merely had possession of defendant Wagner's property and her status with respect to the res was only that of a stakeholder. We think the order of February 13, 1953 was proper to protect the garnishee. The other orders appealed from are not argued, nor do we consider them appealable.

For the reasons given, the judgment against the garnishee and the finding against the intervenor are affirmed.

JUDGMENT AND ORDER AFFIRMED.

FEINBERG, P.J. AND KILEY, J., CONCUR.

92 A

46183

ELMER V. McCARTHY, Appellant,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
CLYDE R. LANDIS, Appellee.	)	OF CHICAGO.

2 I.A.2d 285

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a statutory action of account by a cotenant to recover rent. Trial by the court without a jury resulted in a finding and judgment in favor of the defendant. Plaintiff appeals.

The statute involved is Section 4a, paragraph 5, chapter 76, Illinois Revised Statutes 1953, State Bar Edition, which reads:

> 5. Accounting for profits or benefits.] §4a. When one or more joint tenants, tenants in common or co-partners in real estate, or any interest therein, shall take and use the profits or benefits thereof, in greater proportion than his or their interest, such person or persons, his or their executors and administrators, shall account therefor to his or their co-tenants jointly or severally. [Added by act approved June 28, 1935. L. 1935, p. 936.]

Plaintiff and defendant, both physicians, signed a written five-year lease for office use commencing October 1, 1944. The lease provided for monthly payments starting at $125. These payments were gradually increased at fixed periods to $132.50. The premises consisted of seven rooms. Plaintiff and defendant each had the sole occupancy of two rooms. The other rooms were used in common. The parties shared expenses equally. The lease contains a provision which reads "that in the event of the decease of either of

these lessees Clyde R. Landis, M. D. and Elmer V. McCarthy, M. D., or in the event either should become incapacitated, the one remaining shall then have the privilege of subleasing the space in these premises formerly occupied by the other to another physician."

October 1945 defendant had an attack of cerebral thrombosis which left him partially incapacitated. Before his illness defendant worked from twelve to fourteen hours daily; thereafter he spent only two or three hours a day at his office. Because of his physical condition defendant called in one Dr. Harris to assist him. Dr. Harris agreed to pay defendant $35 monthly for the use of his facilities, including bandages, diathermy, and other equipment. Dr. Harris commenced using the defendant's office and facilities in April of 1946. There he treated his own and some of defendant's patients.

Defendant testified that at the time Dr. Harris came into the premises he told plaintiff that Dr. Harris was "going to do some of my work for me." There was no conversation between plaintiff and defendant concerning Dr. Harris being a subtenant nor did Dr. Harris sign a sublease.

Plaintiff called as an adverse witness by defendant testified in substance that on a number of occasions he objected to Dr. Harris sharing use of the premises occupied by defendant; that afterwards he instituted forcible entry and detainer proceedings against Dr. Harris, which resulted in an adverse decision to plaintiff. Upon the termination of the lease in 1949 the parties surrendered possession of

the premises.

Plaintiff's claim is for one-half of the monthly payments of $35 alleged to have been made by Dr. Harris to defendant for a period of thirty-eight months, aggregating $665. Plaintiff's principal contention is that a cotenant of any interest in real estate who has collected rents therefrom in greater proportion than his interest must account therefor to his cotenant.

The evidence shows that defendant did not appropriate to his own use more than his proportion of the leased premises when Dr. Harris came to assist him. We think the provision of the lease granting the privilege to one of the cotenants here to lease the premises to another tenant in the event of incapacity of either did not contemplate a partial incapacity as in this case. Manifestly the defendant made the arrangement with Dr. Harris to assist him while he was ill, in order to maintain his practice. The evidence does not show that plaintiff was inconvenienced or harmed by the presence of Dr. Harris. Nor does it appear that the defendant by this arrangement had gained any profits from rent as alleged in the statement of claim.

Both parties cite Cheney v. Ricks, 187 Ill. 171 to support their respective contentions. The facts of that case are dissimilar to those of the case before us but we think the principles emerging from the Cheney case support defendant's position that where a tenant in common does not occupy more than his proportionate share of the premises and does not

receive rents or profits from more than his share, he need not account to his cotenant for any benefits or income he may receive. See 62 CJ, 451.

From an examination of the record we think the evidence was sufficient to warrant a finding in favor of the defendant.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY, J. CONCURS.

FEINBERG, P.J. TOOK NO PART.

96 A

46193

HAROLD S. OLSON, and ETHEL M. OLSON, his wife, Appellants,	APPEAL FROM
v.	SUPERIOR COURT
NILS V. WESTERBERG and ANNA WESTERBERG, his wife, Appellees.	COOK COUNTY

2 I.A.2d 285

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a decree dismissing for want of equity their suit for an injunction permanently restraining the defendants from permitting water, mud and silt to drain from their land to plaintiffs' land and directing defendants to level or grade their property where it adjoins plaintiffs' so that there will be no drainage from defendants' land to plaintiffs'.

Plaintiffs, husband and wife, are owners in joint tenancy of the lot at the northeast corner of North Caldwell Avenue (a diagonal street running northwesterly and southeasterly) and Algonquin Avenue in Chicago. Defendants, husband and wife, are owners in joint tenancy of the adjoining lot on the north. Each lot is improved by a single family residence, with garage, shrubbery, etc. Plaintiffs' home was built in 1939. Defendants completed their home about April 1949. The buildings are approximately 37 feet from Caldwell Avenue and between 5 to 7 feet from the dividing line between the lots. Each lot is 120 feet in depth from the street to alley in the rear. When defendants began the erection of their home the grade or level of their

lot where it adjoins plaintiffs' land between the houses was the same as plaintiffs' property. They leveled their lot from front to back and thereby made it higher than plaintiffs' land between the buildings. The land slopes from their house to the lot line between the properties. The elevation of defendants' lot above plaintiffs' is a foot or more. It begins at the front of the house and extends back to the alley. Prior to the erection of defendants' home there was no water, mud, drainage or seepage from defendants' premises to plaintiffs' lot. In June, July and September 1949, following heavy rains, water ran down and on plaintiffs' property into their basement. Complaint was made to defendants. Mr. Westerberg refused to come over to see the basement. His wife said, "What can we do?" These facts are undisputed.

September 6, 1949 plaintiffs instituted suit, alleging in substance the foregoing facts, claiming that they have no adequate remedy at law and praying for a permanent injunction, as hereinbefore mentioned. Defendants answered denying the alleged trespasses and plaintiffs' right to relief. The cause was referred to a master. The hearings commenced May 22, 1950. The master's report was filed September 19, 1952. During the hearings before the master plaintiffs amended their complaint by alleging that the branches of a tree on defendants' premises protruded and extended over the premises of plaintiffs about 15 feet; that the limbs are a menace to plaintiffs and their property; that defendants have refused, on demand, to

remove them. Defendants admit that the branches of the tree extend over plaintiffs' property but deny that plaintiffs are in any danger on account thereof. They allege that when defendants were erecting their home plaintiffs requested that they leave the tree standing.

After the commencement of the suit the parties had a conference, following which defendants erected a concrete wall on their premises along the dividing line between the properties involved herein about 8 inches wide, 18 inches high and 50 feet long, starting approximately at the front of the house and extending to within 10 feet of the back of plaintiffs' garage. There is a conflict in the evidence as to whether this wall effectively prevents the flow or seepage of water and dirt from defendants' land to plaintiffs'. Plaintiffs testified that water and mud drain around the ends of the wall. Mr. Westerberg denies this. His daughter says a little water might run around the retaining wall into the depression on plaintiffs' lot.

The master found the facts in favor of plaintiffs and recommended that a mandatory injunction be issued requiring the defendants to extend the retaining wall erected by defendants during the pendency of the suit approximately 10 feet on its northerly end and to keep and maintain the retaining wall so as to prevent water and dirt seeping from the defendants' land onto plaintiffs' land, and that plaintiffs be given other incidental and minor relief. Both parties filed objections

to the report, which were overruled and stood as exceptions.

While the cause was before the court on exceptions the trial judge directed Mr. Olson and Mr. Westerberg to appear before him for a conference in chambers, in the absence of their respective attorneys and wives, for the purpose of effecting a settlement of the cause. At the close of the conference he stated in open court that he was sending a friend of his--a graduate of Armour Institute and a practicing architect in Chicago, hereinafter referred to as the court's agent--to inspect the premises as a favor to the court, and wanted each of the parties to pay $5 to defray the expenses of inspection. This money was paid. The court's agent sent a letter dated February 3, 1953 to the court wherein he stated he had examined the premises, that at the rear of the building on plaintiffs' property there is a low area the level of which is only about 4 inches below the three basement window sills; that in June, July and September 1949, heavy rains seeped into the basement over the sills; that he, the writer, is of the opinion that the flooding of the basement was from rain falling on plaintiffs' property and that a sewer connection is necessary and would solve the problem of excess water. On February 16, 1953 an order was entered in which the court found that the seepage of any water into plaintiffs' basement was due to rain falling upon the property, and that the tree complained of stood at its present location on defendants' property for a number of years and prior to the erection of the

building thereon. It was ordered that exceptions to the master's report be sustained and that the complaint be dismissed for want of equity, each party to pay half of the costs. Three days later this order was vacated and a decree entered in which the court found the equities in favor of the defendants, sustained the exceptions of the defendants to the master's report and overruled the exceptions of the plaintiffs and ordered the cause dismissed for want of equity and the costs assessed against the plaintiffs. It appears from the report of proceedings before the court on said date that the court stated he was going to split the costs; plaintiffs' counsel stated his objections to the order of February 16, 1953 and to the entry of any decree and wanted to make a record for a report of proceedings in the cause; that the court inquired if plaintiffs' counsel was really going to the Appellate court, and when informed that he was the court stated, "Then I will let the costs follow the decree," and, "Have the costs then taxed against the plaintiff." A further report of proceedings had on May 27, 1953 in re: incorporation into the record of the report of the court's agent, shows that plaintiffs' attorney insisted that the case be decided on the evidence and not on the opinion of someone whom he had no chance to cross-examine, whereupon the court stated that he had based his opinion on the report and a scrupulous reading of every line of the testimony.

The motives of the trial court in trying to effect a settlement of this case are not questioned. However, it must be recognized that when, as here, a court undertakes the settlement of a case, neither the litigants nor their attorneys are free agents. They act under what may be termed judicial duress, in fear of incurring the ill will of the court empowered to decide their case. That their fear is not wholly imaginary is shown in this case when the court, being informed of plaintiffs' intention not to abide by the decision of the court, based in part at least on the report of his agent, changed his decision as to the costs and assessed all of them against plaintiffs. Plaintiffs are not estopped to question the correctness of the decree and to insist that the case be determined upon the evidence before the master. Albert v. Albert, 340 Ill. App. 582; O'Connell v. California Ave. Bldg. Corp., 329 Ill. App. 327 (abst.).

Defendants, the trial court and his agent misconceive the issue in this case. Defendants argued extensively in their brief and on oral argument that there is much evidence that water accumulates on the lot of plaintiffs because of a depression in the rear of plaintiffs' lot and near the dividing line between the two lots in question, causing water and rain falling on plaintiffs' lot to accumulate thereon because of the lack of sufficient drainage. The court's agent, who viewed the premises for the first time more than three years after this suit was instituted and

after the retaining wall had been erected, reported that he was of the opinion that the flooding of the basement in 1949 was due to rain falling on plaintiffs' property, and that a sewer connection would solve the problem of excess water. The trial court in his order entered February 16, 1953 and vacated three days later, found, in accordance with this report, that the seepage of any water into plaintiffs' basement was due to rain falling upon the property. Plaintiffs' suit is predicated on a claim of a trespass upon their property by the drainage and seepage of water, mud and silt from defendants' land, caused by the elevation of defendants' property a foot or more above plaintiffs' land concurrently with the erection of defendants' home. As hereinbefore stated, the evidence is undisputed that prior to the erection of defendants' home there had been no water, mud, drainage or seepage from defendants' premises to plaintiffs' lot, and that plaintiffs' basement was flooded following heavy rains in June, July and September 1949, after the elevation of defendants' land and before the erection of the retaining wall. There is a conflict in the evidence as to whether the erection of the wall effectively prevents the flow and seepage of water and dirt from defendants' land. The master found for plaintiffs on this issue and there is nothing in the record warranting us in disturbing that finding. The question presented is whether at the time of the master's report the drainage or seepage of water and mud around the north end of the retaining wall

onto plaintiffs' property warranted the injunction prayed for and recommended by the master, especially when considered in the light of conditions existing when suit was commenced.

The wrong of which plaintiffs complain is repeated trespasses upon their property caused by the flow or seepage of water, mud and silt from defendants' land due to raising the grade or level when defendants built their home. The damage resulting from each trespass is necessarily difficult of determination and generally small when measured in dollars. However, each trespass is an invasion of plaintiffs' rights and can only be terminated by a restoration of defendants' property to the conditions existing prior to the erection of their home, or, as afterwards attempted by them, by the erection of the retaining wall between the properties long enough and high enough to prevent the flow or seepage of water and mud onto plaintiffs' premises. While, as defendants contend, mandatory injunctions are not favored, the situation presented is one in which the writ is awarded because it is the only means of protecting the injured party. The law is clearly stated in Lyle v. City of Chicago, 357 Ill. 41, where, after quoting with approval from Cox v. Malden and Melrose Gas Light Co., 199 Mass. 324, as follows, "Mandatory injunctions are often granted where the defendant is guilty of a continuing wrong upon the plaintiff, from the further perpetration of which he ought to be enjoined, and where the termination of the wrongful conduct involves a restoration of conditions existing before the wrongful conduct began," the court said:

> "The mandatory injunction is recognized as an extraordinary remedial process, which is granted not as a matter of right but in the exercise of a sound judicial discretion. (Morrison v. Work, 266 U. S. 481.) It is most frequently found in cases of nuisance, trespass and the protection of easements. (Hunt v. Sain, supra; Baumgartner v. Bradt, supra; Dorman v. Droll, supra; Burrall v. American Telephone & Telegraph Co. supra; Spalding v. Macomb and Western Illinois Railway Co. supra.) It is a writ not regarded with judicial favor and is used only with caution in cases of great necessity. (14 R. C. L. 317, and cases there cited.)".

In McRaven v. Culley, 324 Ill. 451, the court, after stating that equity will interfere to enjoin a trespass only when there is no adequate remedy at law or where it is necessary to prevent a multiplicity of suits, said: "An exception to the rule exists where the complainant's title is admitted or has been established in an action at law and repeated trespasses are threatened of such a character that the amounts recoverable as damages in actions at law would be so small and disproportionate to the vexation and expense of the actions as to render the remedy at law inadequate."

What constitutes irreparable injury necessary to give a court of equity jurisdiction, is stated in Winhold v. Finch, 286 Ill. 614, in which case plaintiffs claimed that more of their land was overflowed, and for a longer time, after an embankment had been constructed by defendants, although the obstruction reduced the amount of water coming upon the land. The court said (p. 619):

> "When an owner of property is about to be deprived of a legal right in connection with it by the wrongful act of another for which there is no legal redress the act may be restrained by

> injunction, or, if it has already been executed, may be required to be undone, if this is practicable. The irreparable injury necessary to give a court of equity jurisdiction in such a case is not one so great as to be impossible of compensation, but one of such a character that the law cannot give adequate compensation for it. 'The fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages, only, often furnishes the very best reason why a court of equity should interfere in a case where a nuisance is a continuous one.' (Elliott on Roads and Streets, 497; Newell v. Sass, 142 Ill. 104.) Where an injury is of such constant and frequent occurrence that no fair or reasonable redress can be had for it in a court of law it may be enjoined. Chicago General Railway Co. v. Chicago, Burlington and Quincy Railroad Co. 181 Ill. 605."

The instant case is clearly within the rule announced in the foregoing cases. The flow or seepage of water and mud onto plaintiffs' land was greatly reduced by the construction of the retaining wall. The master found from the conflicting evidence that there was still some flow or seepage from defendants' land to plaintiffs' land. The dollar damage resulting from each trespass is small. Each trespass, however, is an invasion of plaintiffs' rights, and the recommendation of the master that the retaining wall at the northerly end in the rear of the properties be extended ten feet and that the wall as extended be permanently maintained, is reasonable and in all probability least costly to the defendants.

The master found and the record shows without contradiction that the tree on defendants' lot, of which plaintiffs complain, extends over plaintiffs property. This too is a trespass upon plaintiffs' land. The master has

found that the fair and reasonable costs of removing the tree limbs overhanging plaintiffs' property is $40. Unless defendants remove these limbs plaintiffs should be awarded the sum found by the master as damages, if obliged to remove them. The master has also found that the reasonable cost of redecorating the wall of the basement, stained by the flow of water from defendants' land in 1949, is $45. There is no evidence in the record contradicting this finding. The exceptions of the defendants to the master's report should be overruled. The master recommended that the costs be borne equally between the parties. There is merit in this recommendation in view of defendants' effort to correct the condition complained of by building the retaining wall.

The decree is reversed and the cause remanded for further proceedings in conformity with the views expressed herein.

REVERSED AND REMANDED.

BURKE and FRIEND, JJ., Concur.

97 A

46278

RAY SCHALK, LAVINA SCHALK, GROVER LUTGERT and ELLEN LUTGERT, copartners doing business as RAY SCHALK'S EVERGREEN TOWERS, Appellants,	APPEAL FROM SUPERIOR COURT COOK COUNTY
v.	
FRANK SCHAFFER, Appellee.	

2 I.A.2d 286

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs, as copartners, appeal from an order dismissing their suit for an accounting on defendant's motion based on alleged laches and upon the ground that the lease on which the action is predicated was not executed by plaintiffs as copartners.

The complaint alleges the execution of a lease demising to defendant, for a period of ten years from the date defendant entered into possession (November 15, 1941 to November 15, 1951), premises in the Village of Evergreen Park, Illinois for the installation, maintenance and operation of a cocktail lounge and restaurant at an annual rental of $6,000, plus whatever amount the sum of $500 was exceeded by 5 per cent of gross sales of foods and 10 per cent of gross sales of beverages, determined monthly; that on November 16, 1951 plaintiffs regained possession of the premises demised and have since that date continued the operation of a cocktail lounge therein; that although plaintiffs and each of them

were inexperienced in the operation of a cocktail lounge, their gross sales of beverages have greatly exceeded the sales of beverages reported by defendant for a comparable period while defendant was operating the said business. It is further alleged, on information and belief, that the sales of foods and beverages by defendant were greatly in excess of the amount reported by defendant during his tenancy of the premises, and that upon a proper accounting and report by defendant plaintiffs would be entitled to at least $40,000.

The lease, purporting to be between the plaintiffs as copartners, lessors, and defendant, lessee, was signed only by Ray Schalk as lessor. Suit should have been brought in his name. Springer v. Simpson, 175 Ill. App. 631. This misjoinder of parties is not ground for dismissal of the suit. (Civil Practice Act, section 26.) Parties plaintiffs other than Ray Schalk should have been dropped by order of the court.

Nothing appears of record to indicate that defendant has been prejudiced in any way by the failure of plaintiffs to demand a strict accounting during defendant's occupancy of the premises or by the delay of a year and a half before instituting suit after the termination of the tenancy. Laches of plaintiff is not a ground for dismissal of the complaint. Dixmoor Golf Club v. Evans, 325 Ill. 612.

The order is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

BURKE AND FRIEND, J.J., Concur.

46327

BERNARD E. EPTON, Appellant, v. RICHARD B. VAIL, Appellee.	APPEAL FROM CIRCUIT COURT COOK COUNTY

2 I.A.2d 237

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order striking his complaint and dismissing his action for libel.

Plaintiff and defendant were rival candidates for nomination for the office of member of the House of Representatives of the United States for the Second Congressional District of Illinois at the primary election held April 11, 1950. On April 6, 1950 plaintiff instituted this action. By amended complaint filed February 20, 1952 he charged that defendant on April 3rd, 4th, 5th and 6th, 1950, printed, published, circulated and sent out 17,000 circulars to the voters and citizens residing in the second congressional district of Illinois, alleging among other things the following:

> "Hence it is no surprise to find 'Bernie' (meaning the plaintiff, Bernard E. Epton) running against the selected ticket in 1950, particularly since he (meaning the plaintiff, Bernard E. Epton) is well financed in his campaign by funds collected by him in 1948, originally in the interest of Dwight Eisenhower for President (meaning that the plaintiff, Bernard E. Epton misappropriated to his own use funds which were placed with him in trust for the campaign of Dwight Eisenhower for President of the United States). The

> Tribune of 1948, quoted 'Bernie' as stating the funds, reportedly some $25,000.00, would be returned to donors, but a later Tribune article in 1950 quotes 'Bernie' as stating that 'part' of the money was returned. 'Bernie' is non-committal but he admits 'part' of the funds are being expended in his interest. He does not attempt to explain why they were not returned to donors two years ago in full."

Plaintiff contends that the foregoing publication is libelous per se; that it charges him with dishonesty in the handling of trust funds. The charge that plaintiff's campaign is financed by funds collected originally in the interest of Dwight Eisenhower for President, is not a charge of misappropriation of trust funds. It cannot be given that meaning by innuendo unless extraneous matters are alleged warranting an enlargement of the words published beyond their natural import by an innuendo. McLaughlin v. Fisher, 136 Ill. 111, 116. Such allegations are lacking. The language is not ambiguous or uncertain. Whether it is libelous per se is a question to be determined by the court. Tiernan v. East Shore Newspapers, Inc., 1 Ill. App.2d 150. The language must receive an innocent construction when susceptible of such interpretation, and cannot by innuendo be extended beyond a reasonable construction. Creitz v. Bennett, 273 Ill. App. 88; Eick v. Perk Dog Food Co., 347 Ill. App. 293; LaGrange Press v. Citizens Publishing Co., 252 Ill. App. 482.

The succeeding language of the publication in respect to articles in The Tribune in 1948 and 1950 and the failure of plaintiff to explain why the funds collected

in 1948 were not returned to donors two years ago in full, are not libelous. Piacenti v. Williams Press, Inc., 347 Ill. App. 440 [abst.]., Tiernan v. East Shore Newspapers, Inc., supra;

The trial court did not err in striking the amended complaint and dismissing plaintiff's action. The judgment is affirmed.

AFFIRMED.

BURKE and FRIEND, J.J., Concur.

99 A

46265

FRANCES CHESLOG, a minor, by ARTHUR CHESLOG, her father and next friend, and ARTHUR CHESLOG, Appellees, v. LUCILLE T. LAUTZ, Appellant.	APPEAL FROM SUPERIOR COURT COOK COUNTY

2 I.A. 2d 287

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Frances Cheslog, a minor, filed a complaint to recover damages for injuries sustained through the alleged negligence of Lucille T. Lautz and Arthur Cheslog, the father of Frances, joined to recover the sums paid for medical services. A verdict was returned in favor of the minor for $1250 and in favor of the father for $400. Motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial were denied and judgment was entered, to reverse which defendant appeals.

Wilton Avenue is a north and south highway approximately 28 feet wide at 932 west in Chicago. It runs between Wellington Avenue, 3000 north, and Barry Avenue, 3100 north, which are east and west streets. Nelson Street, an east and west highway at 3032 north, runs east from Wilton Avenue. It does not run west from Wilton Avenue. On the east side of Wilton Avenue north of Nelson Street there is a public school playground and adjoining it on the north is the school. The east side

of the block from Nelson Street to Barry Avenue is occupied by the playground and the school, and the west side of Wilton Avenue from Wellington Avenue to Barry Avenue is occupied by houses, except that there is a candy and grocery store at 3046 Wilton Avenue. This store is opposite the north end of the playground. The minor, 5 years of age, was injured when she came in contact with defendant's Chevrolet automobile being driven in a northerly direction on Wilton Avenue near Nelson Street at about 12:30 noon on Monday, April 25, 1949. Defendant, called by plaintiffs under Section 60 of the Practice Act and also testifying in her own behalf, said that she lived 4 or 5 blocks from where the mishap occurred. She had been shopping near the "El Station" on Wellington Avenue, a short distance west of Wilton Avenue, and was driving her car north on Wilton Avenue on her way home. There were no automobiles parked on the east side of Wilton between Nelson and Barry Avenue. There were no children in the playground or schoolyard or around the school at the time as school was not in session that week. Cars facing south were parked along the west side of Wilton between Barry and Wellington Avenue. At the time of the occurrence defendant was 39 years of age. She had driven automobiles for about 25 years and had driven the Chevrolet about 5 years. It was in good mechanical condition. As she passed Nelson Street driving north her car was traveling at a speed of 15 to 18 miles an hour. Driving north she saw "two little children" playing between the parked cars on the west side of Wilton Avenue. Her car had passed

Nelson Street when she first saw the children. Asked whether she slowed down when she saw the children she answered: "I thought I was going very slow as it was." Her car continued north at the same rate of speed. The right side of her car as it moved north was between 2 and 4 feet west of the east curb. There were no people on the street at the time except the 2 children playing between the parked cars. As she proceeded north past the place where the children were between the parked cars, out of the corner of her left eye she saw a flash of a child running east. When she observed the "flash of the child" the child was 8 or 9 feet to the west of her car. She "felt a bump," put on the brakes and stopped her car. She brought her car to a stop within 6 or 7 feet. The car did not skid. She did not blow her horn. When she saw the children out of the corner of her eye the front part of her car had passed them. She got out on the left side and walked toward the rear of her car. The child, later identified as the plaintiff, was sitting on the pavement with her "left foot underneath her." The space between the parked cars from which the child emerged was about 6 feet. The child ran towards the rear of the car and into the left rear fender. The impact took place approximately opposite the store at 3046 Wilton Avenue. Defendant estimated that she stopped the car in "maybe another lot." In discussing the width of a lot she estimated that she stopped her car "between 15 and 20" feet.

A fire department ambulance arrived and took the child to a hospital. She had a swelling on her forehead, abrasions and contusions and a fracture of the lower third of the right tibia. The attending physician said that his patient "got a good bony callous formation" and "a pretty nice result." James Kelly, a policeman assigned to the Accident Investigation Squad, arrived at the scene about half an hour after the occurrence. He wrote out an accident report, obtaining nearly all of the information from the defendant. A photostatic copy of the report was received in evidence. He stated that she said the left front of her automobile came in contact with the injured child; that she told him she was 10 feet from the child when "she noticed there was danger"; and that at the time she first noticed the child her automobile was proceeding at "approximately 20 miles an hour." On cross-examination Officer Kelly said he investigated 7 or 8 accidents a day and that he does not have any "distinct independent memory of any particular accident." He testified that there "was a skid mark on the street" in front of the building at 3046 Wilton Avenue. He acknowledged that he wrote on the report with respect to the part of the car with which the child came in contact the "left side," and that he wrote "no improper driving indicated," which meant that from the investigation "there was no improper driving." To the inquiry "Did you ask her what she estimated her speed was" he said she replied "approximately 20 miles an hour."

To the inquiry "Did you ask her what her estimated speed was at the time of the accident" he replied that she said it was 15 miles an hour. He said she told him that her car traveled 8 feet after the impact and that the impact occurred in the middle of the block. A diagram on the accident report shows defendant's automobile facing north opposite 3046 Wilton Avenue with a small circle to the west of the left side of the car near the front.

Audrey Wacholder, called by defendant, testified that on the day of the occurrence she lived with her family on the second floor of the building at 934 Barry Avenue. This building is on the north side of Barry Avenue. Wilton Avenue does not run north from Barry Avenue. The building is "right opposite" and faces Wilton Avenue. She was 18 years of age and a senior in high school. She stated that she was waiting for a "date" and was leaning out of her window. She saw the automobile "coming down the street very slowly." She did not see the child until "she fell and she was at the left rear fender of the car, just behind it a little bit." She saw the child running across the street. She said the child did not at any time "get in front of the automobile." She did not see any other children in the street. She saw "the little child hit the left rear fender." She thought that the defendant stopped her automobile "anywhere from 5 to 6 maybe 7 feet." She said that she drove a car and estimated that defendant was driving at a speed of "say 15, 16 or 17, something like that, it could have been 18 or 19.

All I know it was slow."

It is apparent that there was no proof that defendant was guilty of negligence. All the evidence shows that she was driving her automobile north on Wilton Avenue at from 15 to 20 miles an hour from 2 to 4 feet west of the east curb and that after she passed Nelson Street she saw 2 children standing between 2 parked cars near the west curb. They were not standing near the path of her automobile. She was driving slowly and keeping a lookout ahead. Frances Cheslog ran out from between the 2 parked cars into the left front or the left rear of her automobile. Officer Kelly said that defendant told him that the child ran into the left front of her automobile. He said that he had no distinct recollection of accidents. The report he made out in response to questions answered by defendant indicates that the impact was at the left side of the automobile. Mrs. Wacholder and defendant testified that the impact was with the left rear fender. After the defendant saw "a flash" of the child and felt a bump she put on her brakes and stopped within a short distance. The defendant was proceeding at a lawful speed and with all due care.

Plaintiffs cite cases in support of their contention that there was evidence that defendant's automobile was not operated with due care because of failure to sound the horn. Section 115 of the Motor Vehicle Act (Par. 212, Ch. 95-1/2, Ill. Rev. Stat. 1953) provides

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Plaintiffs cite cases in support of their contention that there was evidence that defendant's automobile was not operated with due care because of failure to sound the horn. Section 115 of the Motor Vehicle Act (Par. 212, Ch. 95-1/2, Ill. Rev. Stat. 1953) provides

that the driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use his horn when upon a highway. Par. (d) of Sec. 75, (Par. 172, Ch. 95-1/2 Ill. Rev. Stat. 1953) provides that every driver shall exercise due care to avoid colliding with any pedestrian upon any highway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or any incapacitated person upon a roadway. In the instant case the child ran into the side of the automobile. It is apparent that there was no necessity for blowing the horn. The evidence shows that defendant was exercising "proper precaution." As there is no proof that defendant was negligent in the operation of her automobile, the judgment of the Superior Court of Cook County is reversed and the cause remanded with directions to enter judgment against plaintiffs.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

NIEMEYER, P. J. and FRIEND, J., Concur.

100 A

46152

AGNES WISLA, Appellee, v. EDWARD F. FRY, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY

2 Ill. 2d 238

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In a suit to recover damages for personal injuries sustained by plaintiff when she was struck by defendant's automobile, the jury returned a verdict in her favor for $37,000.00. Motions for judgment notwithstanding the verdict and for a new trial were overruled, and judgment was entered on the verdict, from which defendant appeals.

The accident occurred about 9:30 p.m. on October 15, 1950, at the intersection of Milwaukee and Montrose avenues in Chicago. Montrose avenue runs east and west; Milwaukee avenue, northwest and southeast. Both are much-traveled thoroughfares, and measure forty-two feet from curb to curb. There were three-cycle stop-and-go lights on all four corners. Plaintiff was attempting to cross Montrose avenue from south to north several feet west of the intersection of the two streets, and was struck by defendant's car which had crossed the intersection, proceeding west on Montrose avenue, in the inner or center traffic lane.

It appears from the evidence that plaintiff had been visiting her niece, Virginia Guthrie, who

resided at 5454 Cullom avenue. Mrs. Guthrie's husband, traveling east on Montrose, drove plaintiff to the intersection of Montrose and Milwaukee avenues, and let her off on the south curb of Montrose and about two car lengths west of Milwaukee, from which point she intended to cross to the northwest corner, buy a newspaper and take the street car to her home at 2386 Milwaukee avenue. She testified that after Guthrie had driven on, she walked to the south sidewalk, window-shopped for a few minutes, walked up to Milwaukee avenue and turned to the curb on Montrose avenue; that there were some cars going east, but that she did not remember whether there were any westbound cars; that she observed the traffic signal on the northwest corner which was red, then waited, and when it changed to green she started to walk across Montrose; that a car going east pulled up so close to Milwaukee avenue that it blocked the crossing, requiring her to pass it either to the front or the back, and she chose the latter alternative; and that she did not see any cars crossing Milwaukee avenue. When she reached approximately the middle of Montrose avenue, she said that she looked to her right but did not see any traffic moving, and when she had almost reached the north curb, she was hit by defendant's car. She stated that she did not see the car until it hit her, nor did she know where it came from. She remembered nothing else in connection with the occurrence until she regained consciousness at Belmont Community Hospital, where she was taken following the accident.

According to plaintiff's testimony, the eastbound car which blocked the crossing was a few feet away from the curb. She said that as she passed behind it she did not see any other cars between it and the middle of the street; that there were cars to the west of it, but that she could not say how many.

Elaine Grotz, a witness for plaintiff, had just alighted from a Milwaukee-avenue street car and was standing on the northwest corner, facing southeast. She stated that she did not observe the operation of the traffic lights, nor did she notice if there were any moving automobiles on Montrose avenue crossing from either the east or the west; that she first saw plaintiff when she was not quite half-way across Montrose; that plaintiff was definitely in the crosswalk; that defendant's car struck her just before she reached the north curb; and that just before the accident she did not see defendant's car. On cross-examination, the witness stated that she could not remember whether plaintiff crossed within a foot or two of the rear of the automobile standing on Montrose.

Dr. Archie M. Kadow saw the accident the instant it occurred. He was standing a couple of doors north of the corner. He testified that plaintiff was on the crosswalk; that the right front fender of defendant's car came in contact with her; and that he gave plaintiff first aid, assisted in placing her leg in a splint, and in putting her in the ambulance.

Edward F. Fry, testifying in his own behalf, stated that he had driven west on Montrose, approaching Milwaukee at a speed of about twenty-five miles per hour; that the Montrose traffic lights were green; that there were cars going east, crossing the intersection; that his car was about a foot north of the center line of Montrose; and that he entered the intersection at about twenty miles per hour. He further stated that there was an eastbound car in the inner lane of Montrose which had stopped in the center of the intersection preparatory to making a left turn into Milwaukee, that there were at least two other cars that had stopped to the rear of it and that other cars were coming up; that after he had gotten across Milwaukee, plaintiff darted out from behind an eastbound car into his path of travel. He was then going about ten miles an hour, and plaintiff was about eight to ten feet from the north curb at the time. The front of his car struck plaintiff; his right front headlight was broken, and the right front fender received a small dent. He jammed on his brakes, and after the accident plaintiff was lying to the north and about four to five feet to the rear of his car.

Mrs. Fry, his wife, who was seated beside him, testified that as they crossed the street there were cars to the left of them, facing east, which were standing still. She noticed plaintiff dart from behind a waiting car to their left and into the path of defendant's automobile; and in other respects she also corroborated defendant's testimony.

Robert Oudin, a witness for defendant, testified that he was driving east on Montrose avenue; that when he arrived at the intersection he had the stop light; that when the light changed he put out his hand to signal a left turn and pulled up to the northbound tracks on Milwaukee, pausing there to let some cars go by, among which was defendant's automobile; and that defendant's speed was about fifteen to twenty miles per hour. He then waited for two other cars to pass, and heard the thud of an impact while he was making his left turn. After he pulled to the curb on Milwaukee avenue, he crossed on foot to the scene of the accident. Mr. Fry's car was on the inside westbound lane of Montrose, and there were at least two or three other cars behind him. He further stated that there were likewise at least two or three cars behind him while he was trying to make his left turn. His wife and two children were with him, and Mrs. Oudin substantiated his testimony.

Aaron Dunn, another witness who saw the accident and gave defendant his card, testified that at the time of the occurrence he was driving east on the outer lane of Montrose; that he intended to turn right onto Milwaukee and go south; that as he approached Milwaukee, the east and west traffic lights were green; that there was traffic in the inner lane moving slowly eastward. He saw plaintiff at just the moment defendant's car struck her, and he concluded that she "must have been to the rear of the car as it was moving into the intersection." He estimated that

she was approximately ten feet west of the crosswalk when he first saw her. The light that showed east and west at the time defendant's car and plaintiff came together was amber. At the time of the impact the witness did not go to the scene of the accident, inasmuch as he could find no parking space. Instead, he continued on home, a distance of only seven blocks, then about fifteen minutes later returned and made himself known to defendant.

The evidence supports the conclusion that if plaintiff walked behind a car which blocked her passage, as she believes she did, she must necessarily have proceeded to cross some distance west of the crosswalk and in front of the cars which, so she stated, stopped to the rear of it. Even though she had the green light in her favor, she was still required, in the exercise of reasonable care for her own safety, to guard against traffic along Montrose avenue. She testified that when she had just about reached the middle of Montrose avenue she looked to her right but "didn't see anything moving," although the fact must undoubtedly be that the defendant's car was only a short distance from her at the time she reached the middle of Montrose, and she must have seen the car if, as she testified, she did in fact look. "Courts are not required to accept as true testimony which contains such inherent improbability as to impeach itself" and "may disregard testimony which is discredited by circumstances as well as by the statements of the witness himself." Lasky v. Smith, 407 Ill. 97.

Narrowed to the consideration of visual observation, this principle has, in Dee v. City of Peru, 343 Ill. 36, been stated as follows: "The law will not tolerate the absurdity of permitting one to testify that he looked and did not see the danger when the view was unobstructed and where, if he had properly exercised his sight, he would have seen it."

There is no evidence tending to prove that defendant's car was not being properly driven at the time of the occurrence, or that it was being driven at an excessive rate of speed. Defendant's testimony, which is corroborated by the testimony of other witnesses, is that he entered the intersection on the green light, that he was traveling in the inner traffic lane, driving cautiously through the intersection, and that his speed at the time of impact was about ten miles per hour. His car traveled only about eight to ten feet after the impact before it came to a stop.

After a careful detailed examination of the record we have reached the conclusion that the verdict is contrary to the manifest weight of the evidence. Since the case will in all probability be retried, defendant's contention that the verdict is excessive need not be discussed. The judgment of the Circuit Court is reversed and the cause remanded with directions that defendant be granted a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

NIEMEYER, P.J. and BURKE, J., Concur.

101 A

46239

RUTH H. SULLIVAN, original plaintiff, CLAUDE H. BRUMFIELD, substituted plaintiff, Appellant, v. LOTTIE REMINGTON; THE SPOUSE OF LOTTIE REMINGTON, IF ANY; LUTIE H. ADAMS, SOMETIMES KNOWN AS LUYTIE H. ADAMS; THE SPOUSE OF SAID LUTIE OR LUYTIE H. ADAMS, IF ANY; CARRIE CHATLIEN; ATLAS CONSTRUCTION COMPANY, INC., an Illinois corporation; THE ALLIANCE INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA; JAMES L. KANALEY & CO., CHICAGO, ILLINOIS, AGENTS; and UNKNOWN OWNERS, Defendants, LUTIE H. ADAMS, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY

2 I.2d

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The original plaintiff, Ruth H. Sullivan, brought suit against Thomas and Lottie Remington, and other defendants, to foreclose the lien of a first mortgage on property improved with a three-story brick dwelling located at 6048 Harper avenue in Chicago, alleging six months' default in the payment of monthly installment notes. Plaintiff, having secured a divorce from George C. Sullivan, her husband, subsequently married Claude H. Brumfield, and he was substituted as plaintiff. The cause was referred to John P. McGoorty, a master, who, pursuant to hearing, recommended a decree of foreclosure. The matter then came up on exceptions to the master's report; the

chancellor sustained the exceptions and dismissed the suit for want of equity, from which decree plaintiff appeals.

The foreclosure suit was instituted May 26, 1950. The amount of the mortgage was $6000.00 and was given to secure installment notes of $75.00 each, payable monthly, beginning June 15, 1947. There was also a provision for the monthly payment of one-twelfth of the estimated annual taxes and assessments, and the indebtedness bore interest at five per cent per annum.

Thomas Remington, a bachelor, and his mother, Lottie Remington, had acquired title to the property in joint tenancy on May 6, 1947, and on that day had made a $3000.00 junior mortgage to Ruth Sullivan, which was sold and assigned to Carrie Chatlien on June 30, 1947. Thomas Remington died July 27, 1948, and his mother, divorced but not remarried, became the surviving joint tenant. As such she entered into an agreement for sale of the premises by warranty deed, including the furniture and fixtures, to Lutie H. Adams upon the following terms: a cash payment of $2901.74; the further sum of $1142.88, payable at $60.00 per month, with interest; the buyer undertaking to pay the general taxes for 1947 and thereafter, as well as payment of all amounts due and owing under the terms of the first mortgage, and all payments due on the junior mortgage. An itemized inventory of the furniture and furnishings

included in the sale was attached to and made a part of the agreement for warranty deed.

After Ruth Sullivan's marriage in December 1949 to Brumfield, who was a Chicago resident and building contractor, he became the real party in interest in the foreclosure of the first mortgage, but it was not formally assigned to him until May 29, 1950. The suit was continued in Ruth Sullivan's name as plaintiff until May 18, 1951, when Brumfield was formally substituted, under the provisions of section 54 of the Practice Act (Ill. Rev. Stat. 1953, ch. 110, par. 178). However, the order of substitution provided that, until further order of court, title of the cause should remain unchanged. All payments on the first mortgage were made to Ruth Sullivan; she accounted to her husband, Claude H. Brumfield, for the $75.00 monthly installments, as received.

The first mortgage was secured and protected by a fire, lightning and extended coverage insurance policy of the Alliance Insurance Company of Philadelphia, in the amount of $8000.00, for a term of five years expiring December 12, 1951. This policy, with the consent of the insurance company, was assigned by Carrie Chatlien, then owner of the property, to the Remingtons and Ruth H. Sullivan, mortgagee, as their respective interests appeared; and the policy, so assigned, was delivered to and held as additional security by Ruth Sullivan.

A fire occurred on the premises on September 23, 1949. The insurance company refused to pay the adjusted loss of $1248.31 to the plaintiff-mortgagee but was willing to deposit that sum with the clerk of the Superior Court or to pay it to a receiver appointed by the court. Thereupon the insurance company and its Chicago agent were joined as parties defendant. They filed their appearance and answer, reiterating their willingness to deposit the money in court or pay any receiver appointed by the court, if so ordered. Accordingly, on plaintiff's motion, an order was entered June 23, 1950, appointing the Chicago Title and Trust Company as receiver. On July 27, 1950 a judgment order was entered against the insurance company in the amount of $1248.31 in full satisfaction of its liability for the fire loss. The judgment was immediately paid in open court to the Chicago Title and Trust Company as receiver, and thereupon the insurance company and its agent were dismissed as defendants.

Lutie H. Adams, who, at the time the fire occurred, was in possession of the premises under her agreement for a warranty deed, had been receiving a weekly rental of $33.00 from that portion of the premises damaged by the fire in question, and she contends that she was unable, because of the failure and refusal of Ruth Sullivan to turn over and deliver the insurance policy to the insurance company so that the claim for loss could be processed and the claim paid, to repair the fire-damaged

premises, resulting in a continual loss to her of the weekly rent which she otherwise would have received; and the defense thus interposed is that plaintiff in the foreclosure proceeding came into court with unclean hands. In her answer Lutie H. Adams set upthis sole defense and also interposed a counterclaim which set forth the same facts and relied on the same legal theory as support. Specifically, she urged her inability to make the mortgage payments, which were admittedly in default, because of loss of speculative profits from her rooming-house business. It is significant that that circumstance was not mentioned in, and had nothing to do with, the mortgage contract assumed by her. This was not a lease but a mortgage requiring installment payments. Of course, under a lease of business property for a specified purpose, breached by the landlord, it is possible that the injured tenant may have redress in damages for loss of profits, but there is no analogy in this respect to the instant mortgage.

With respect to the tender of the insurance policy, there is evidence of record that Lutie H. Adams refused the insurance policy when Claude Brumfield, the substituted plaintiff, came to Chicago from California to tender it to her personally in November 1949, a comparatively short time after the fire. She told him that she was in the process of refinancing the property and intended to pay off the mortgage. Thereafter she made demands for the policy by

mail and telegram, and stated in her pleadings that the policy had not been tendered to her. Meanwhile she refused to make any more payments on the mortgage, pleading her inability to do so by reason of her loss of revenue from the rooming house. She testified that she had for a long time been unable to pay, that Brumfield had told her that she might make up the payments if she desired, and that she had told Ruth Sullivan months before that she was in the process of refinancing the property. While testifying she reluctantly admitted that she had told Brumfield the same thing when he had tendered the insurance policy to her in November 1949. The cross-examination in this respect was as follows:

"Mr. Vent: Q. What was the conversation when he pulled the policy from his pocket?

A. There wasn't much conversation about it.

Q. There was some conversation?

A. I saw the policy in his hand.

Q. In that connection you asked him if the mortgage could be paid off?

A. Yes, if he was willing, and he said yes.

Q. Well, you told him you were in the process of refinancing the property, did you not?

A. Well, I told Ruth Sullivan that months before.

The Master: Q. Did you tell him that?

Mr. Vent: Q. Did you tell Mr. Brumfield you were refinancing the property and could the mortgage be paid off?

A. Why, sure."

In the light of this testimony, the averments of the answer and the allegations of the counterclaim are at such sharp variance with the admissions of the witness as to be untenable, and have no place in the findings which were the basis of the decree dismissing the case for want of equity.

It appears that in the course of the proceeding the court allowed plaintiff's motion to strike and dismiss the counterclaim. Plaintiff contends that since the averments of the answer and the allegations of the counterclaim were precisely the same, this constituted res adjudicata, and considerable space is devoted in the briefs to that question. However, we consider it unimportant because the sole defense interposed is that of unclean hands, and an examination of the record does not sustain defendant's position in that respect.

Although plaintiff's brief is quite voluminous, we are satisfied that the issues are comparatively simple. This was a mortgage foreclosure, on which there were admitted defaults extending over a period of six months, and the circumstances which are relied on to support the only defense interposed fall far short of affording grounds for dismissal of the suit. Accordingly, the decree of the Superior Court is reversed in its entirety, and the cause remanded with directions that the decree of June 15, 1953 be vacated; that a decree of foreclosure be entered in

accordance with the findings and recommendations of the master, at appellee's costs; and that the cause be referred to a master to proceed with the sale.

DECREE REVERSED IN ITS ENTIRETY
AND CAUSE REMANDED WITH
DIRECTIONS.

NIEMEYER, P. J., and BURKE, J., Concur.

Del Ag. 2d 289

102 A

46258

STANLEY SZYMANSKI, Appellee,	APPEAL FROM
v.	SUPERIOR COURT
CHICAGO MOTOR COACH COMPANY, a corporation, Appellant.	COOK COUNTY

12 Ill. 2d 250

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for injuries sustained while riding as a passenger on one of defendant's motor coaches. The accident occurred July 7, 1948. Plaintiff had boarded the motor coach in which he was riding at the Union Station in Chicago, occupying a seat on the right-hand side, running parallel with the side of the coach, and to the rear thereof. At the intersection of Roosevelt Road and Damen Avenue the coach was struck from the rear by another coach, also belonging to defendant. Liability is admitted, but defendant questions the nature and the extent of the injuries claimed and seeks reversal on the ground that the verdict for $10,000.00, on which judgment was entered and from which it appeals, is excessive.

At the time of the occurrence plaintiff was employed as a paint grinder by Sears Roebuck and Company, working forty hours per week at an hourly salary of $1.37. His duties involved setting up his machine for the fineness of

the grind. The major part of his workshop was located on the third floor of the factory, but a small part thereof was on the fourth floor, since the paint, after it is mixed in paste form, comes down to the machine from the floor above. Plaintiff's work required him to stand about 75 per cent of the time, and he averaged twenty-five trips a day to the fourth floor to adjust the opening to regulate the amount of paint that was to run down to his machine. Plaintiff also cleaned the machinery, an operation which required him to bend.

As to the collision, plaintiff testified that his right foot was caught between the seats, and that the impact caused the back of his neck to strike the arm rest of the seat. The police who arrived at the scene of the accident took him to Cook County Hospital. He testified that following the accident he had a sharp pain in the back of his neck, and that it felt as if something had snapped; and that his right leg was bruised. He left the coach without assistance following the collision. After his arrival at the hospital he was given no first aid. The hospital record which was admitted in evidence shows that he was examined by Dr. Buckingham who entered a notation on the record that plaintiff had a "contusion to the right calf, half an hour ago."

After examination plaintiff left the hospital, took a Harrison street car to California Avenue, transferred to a bus which he rode to 16th Street, got off and walked over a block to his home. He was carrying a suit case

which he had had with him at the time of the accident. Upon reaching home he went to bed and arranged to see Dr. Benjamin Pearlman the next day at Mt. Sinai Hospital. He told Dr. Pearlman, who made a thorough examination, that his neck hurt. He was required to strip and lie on the examining table, and his entire back was examined. There were no cuts, nor was there any bleeding, on any part of his face, head or body; the only mark was on the calf of his right leg. Dr. Pearlman did not apply any bandages to any part of his body, nor did he prescribe any medicines. Plaintiff saw Dr. Pearlman only two or three times the week following the accident, and did not consult him thereafter. Plaintiff was on vacation at the time of the accident, and was due to return to work about the middle of July; he was uncertain whether he resumed working in July or August. He took a total of ten therapy treatments at Mt. Sinai Hospital up to the end of July 1948, but none since then. In October 1949, some fifteen months after the accident, plaintiff's attorney sent him to Dr. Reiffel, who took x-rays of plaintiff. Again, no medicines were prescribed, and the doctor told plaintiff nothing.

After returning to work, he pursued his employment continuously from that time to the time of the trial. Since the accident he has received several raises in pay and testified that at the time of the trial he was receiving $1.93 per hour. When the accident occurred he was working forty hours per week, but at the time of the trial he worked

fifty to fifty-five hours, standing three-fourths of the time.

From July 15, 1948, which was the date he last saw Dr. Pearlman, to October 1949, when he visited Dr. Reiffel, plaintiff consulted no other physician and received no medical treatment until he visited Dr. Charles N. Pease in July 1951. Dr. Pease took x-rays and suggested that he take aspirin and apply hot turkish towels to his neck. Following his last visit to Dr. Pearlman, plaintiff took hot baths and sun-lamp treatments. He testified that these did not seem to help him; that he had a pain in his back constantly; that when he bent over to pick up something, a pain would shoot up to the back of his head, resulting in headache; that he could not straighten his head all the way back; and that he experienced difficulty in tying his shoes.

Neither Dr. Pearlman nor Dr. Reiffel was called as a witness at the trial, and no explanation was made for their absence. Dr. Pease, one of plaintiff's expert witnesses, who had treated him long after the accident, testified that plaintiff needed a surgical spinal fusion, the customary charge for that type of operation being from $750.00 to $1000.00; that the patient would be hospitalized for three to six weeks; and that there would be a period of convalescence of about five to six months, necessitating his absence from work during that period. It was the doctor's opinion that the condition of the fifth cervical vertebra was sufficient to cause the pain of which plaintiff complained.

Two other expert witnesses testified at the trial. One of these, Dr. Horace E. Turner, called on behalf of plaintiff, had examined him shortly before the trial. From x-rays in evidence he stated in substance that there was a deformity along the anterior aspect of the body of the fifth cervical vertebra which, in his opinion, was the result of a compressed fracture suffered by plaintiff sometime in the past, but he could not fix the date. In answer to a hypothetical question he stated that "there may be or might be a causal connection between the accident as described in the hypothetical question and the ill-being" of plaintiff, that this condition was permanent in nature, and that surgery would be necessary to correct the condition.

Dr. Sidney S. Greenspahn, a consulting surgeon, was called as a witness on behalf of defendant. He stated that he had examined plaintiff on May 13, 1953, shortly before the trial; that at that time plaintiff kept his head in a rigid neutral position; and that he complained of pain in his neck. He examined plaintiff's back and found that it was normal; there was no evidence of nerve detachment, atrophy or swelling, either in the upper or lower extremities. He gave plaintiff a nerve test of the reflexes and found that they all responded pathologically. In interpreting plaintiff's x-rays he found no fracture of the fifth cervical vertebra and stated that if there had been a fracture there would be some evidence of where the conversion occurred, and that as a result thereof there

would be a body adjusting to the break; that the x-rays showed no breakage; and that in his opinion there was no evidence of any old or recent fracture. He further testified that the healing period for a fracture is from three weeks to four months; that any fracture is painful and would cause immediate pain; that any attempted movement of the part would cause a sensation known in medicine as crepitation; that the tissues would be red and hot because of the inflammatory reaction of the muscles and ligamental tissues; that swelling would be present; that he would know if a fracture was recent because in that event some small deposits of calcium would be evident; but that after a fracture is healed there is no way medically of telling how long ago it was sustained.

From a careful examination of the record we have reached the conclusion that the amount of the verdict is excessive. Following the accident plaintiff returned to the same job which required him to stand three-fourths of the time, made many trips daily up a flight of stairs in connection with his work, is presently employed fifty-five hours a week, making approximately 165 trips upstairs a week, and earning $1.93 per hour. On the basis of his longer work week and increased per-hour pay, his earnings are now something better than $100.00 a week, or nearly double his earnings at the time of the accident.

Plaintiff seeks to justify the verdict primarily on the future consequences of the claimed injuries. It is significant, however, that none of the attending physicians

prescribed or contemplated surgery. Only Drs. Turner and Pease recommended that procedure, and their testimony is based on x-rays taken long after the accident occurred. The future consequences of any injury, in order to become an element of damage, must be reasonably certain to follow as a proximate cause of the injury. The questions propounded to Dr. Pease and Dr. Turner did not satisfy the requirement that the future medical care needed or required could reasonably be presumed to be necessitated as the result of the claimed injuries. Accordingly, we have reached the conclusion that a remittitur should be entered, and if plaintiff will, within ten days, assent in writing to the entry of a remittitur of $4500.00, it is ordered that judgment be entered here in favor of plaintiff for $5500.00; otherwise, the judgment is reversed and the cause remanded for a new trial for the sole purpose of ascertaining the damages.

JUDGMENT HERE IN FAVOR OF PLAINTIFF FOR $5500.00, PROVIDED THAT PLAINTIFF ASSENT IN WRITING, WITHIN TEN DAYS, TO REMITTITUR OF $4500.00; OTHERWISE, JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL WITH DIRECTIONS.

NIEMEYER, P. J., and BURKE, J., Concur.

4113

FILED

MAY 17 1954

JUSTUS L. JOHNSON
Clerk Appellate Court-Second Dist.

A

General No. 10746 Agenda No. 18

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

Abstract

February Term, A.D. 1954

MARTIN PENNEWELL, a Minor, by ADA E. PENNEWELL, His Next Friend, Plaintiff-Appellant, vs. AUGUST L. MAGNELIA, Defendant-Appellee.	Appeal from the Circuit Court of Winnebago County.

Dove, J.

In the early part of September, 1950, the plaintiff was employed by the defendant to work on his 230-acre farm by the month. He was to receive for his services his board and room and $95.00 per month, which was the customary and prevailing wages at the time and in the community where plaintiff was working. His duties consisted of the customary farm work, such as milking, caring for live stock, building and repairing fences and outbuildings, cutting hay and corn, filling silos, blowing straw into the barn and in connection therewith the operation of all kinds of farm machinery.

Plaintiff was born on February 26, 1933; he attended school regularly and first worked on a farm during the summer months of 1947. During that summer he worked on the Edward Shindler farm. In the summer of 1948 he worked on the Jess Collins farm near Wilton, Wisconsin, and while there helped with the farm chores and operated tractors, pickers, and a horse-drawn hay mower. In the summer of 1949 he again worked

on the Shinder farm and was also employed by Charles Franks on the Plunkey farm and while there worked on a forage blower. He attended grade school and two years of high school while he lived with his family at Pryor, Wisconsin. The family then moved to Beloit, Wisconsin and plaintiff there finished his high school course with an average "c" grade, graduating in June, 1950.

After plaintiff's graduation he worked on the McSweeney farm for a month and then went to the O'Brien farm near Woods for two months. While at these farms he operated hay mowers, tractors, pickers and other farm machinery. Upon leaving the O'Brien farm in September 1950 he went to work for defendant, being employed by Charles Franks for whom plaintiff worked in 1949 and who, in September 1950, was managing defendant's farm. On September 16, 1950, while in the employ of defendant, plaintiff suffered the loss of his right leg while operating a mechanical corn blower or elevator and thereafter filed the instant proceeding to recover damages therefor. The defendant offered no testimony but rested his case at the conclusion of plaintiffs evidence. At the direction of the trial court the jury returned a verdict finding the defendant not guilty, upon which an appropriate judgment was rendered, and plaintiff appeals.

Upon the trial the plaintiff testified that he was familiar with the operation of the mechanical corn blower which occasioned his injury and that he had worked on one the same summer at the McSweeney farm. He then stated that a couple of days before the accident he and Mr. Franks had used the blower to put straw in the barn and corn in the silo. As

abstracted by his counsel the witness then continued: "On September 16, 1950, Mr. Franks was out in the field chopping corn and I was to haul it to the blower and put it into the silo. It was in the afternoon of the day it happened. I did not work on that machine that morning. After dinner Mr. Franks had a wagon hitched to a tractor and he loaded that and I took it to the silo, backed the wagon up to unload it while Mr. Franks was chopping another load. I was in the barnyard next to the two silos. I unloaded from the wagon into the trough of the blower. It is a trough about six feet long and about three feet wide at the top and it tapers to the bottom. There is an auger in the blower which turns which is about a foot in diameter. It is in the bottom of the trough and is about six feet long. The top half of the box was too high for the wagon so we had it dug down in the ground by the wheels so that it was low enough to back the edge of the wagon over and unload from. No more than a foot and a half or two feet from the ground. There was a fan on one end of the auger that blew silage up into the silo. The blower and auger was running off of the pully to which there was a tractor and belt to run it. The tractor was on the backside of me when I was standing. I was standing on one side of the blower and the wagon was on the other side and the tractor was to my back. The blower was to the north, the wagon was on the east side and I and the tractor was on the west side. The tractor was 25 or 30 feet behind me. The tractor was connected to the blower by the belt.

"I went to the field and got the load of corn silage and backed it up to the blower. There was a rod running from the tractor to the wagon and turned a belt at the bottom

of the wagon to pull the corn out. After I disconnected the hinge in the tractor and hooked the tractor to the wagon where it turned the chain on the bottom of the wagon to take the corn out, I went back and put the wagon in gear and opened the end gate. I was standing across the trough when I opened the end gate. I started the tractor and put the pully in gear. Then I went back and pushed the lever in the side of the wagon to start the chain and gear on the apron to bring the corn out. The lever is on the wagon. It starts the chain on the bottom of the wagon to move the cor out. I opened the end gate first. There are two latches at the bottom. You release these latches and push the end gate up and it locks in place. It raises right over the blower parallel with the ground. The gate extends about four feet over the trough portion of the blower and about five and a half feet off the ground. You regulate the control of the flow of corn out of the wagon keeping it going through and making sure that it didn't plug up the blower. You had to reach across the trough. There is a lever inside the wagon that controls the apron, starts or stops it on the wagon. It takes about 15 or 20 minutes to empty the wagon. During that time you sit next to the trough crossing the wagon and control the way it comes out and you had to reach across the trough with the fork to get some of the corn down, otherwise it wouldn't come out. When it is empty, you take the wagon back to the field and get another load. I got two or three loads that day. I used two wagons.

"I was working alone on the machine. I brought this second or third load and started unloading it like I did the first load. I brought the wagon in from the field and backed it up to unload it, finished unloading it, which took about 20 minutes space, and then lowered the end gate on the wagon.

When I lowered the end gate, there was two latches on the wagon and one of them got out of place and wouldn't lock, so I reached across with my foot. It was too hard to do with your hand. There was a pretty big spring on it and I put my foot against it and shoved on it and my foot dropped on this auger and caught. That is all there was to it. I got caught. There was nothing I could do to get out. Down at the far end of the machine there was a lever sticking out that was to disengage the auger. I was standing about the middle of the trough and it was a good arm's length away. I might have been able to reach it if I had let myself fall that way so I could reach out and grab it. It is a lever sticking up about two and a half feet at the end of the machine. It is at the right end of the machine away from the chain part. On the South end of the machine. It disengages the auger. Nothing was attached to the upper end of that bar. My foot caught in the auger and there was a little boy there and when I couldn't pull my foot out I yelled to him to get help. There was nothing I could do. It just kept going and the belt jumped off the pulley and the machine stopped, but by that time my leg was all the way through the machine. There was nothing left of it."

On cross examination the plaintiff stated that the augur was visible in the trough of the blower when you looked into it: that he knew it was there: that it didn't surprise him to see it there: that he could see it moving and knew it was driven by the tractor which was connected by a belt to the blower and that he intended to shut off the blower and augur when he returned to the field for another load. The plaintiff further testified: "I had seen machinery like this run and understood from watching them run and from working on them how they were operating. Any average person would know that machinery run by power take-off or by belt was dangerous. The machine was operating then the same

as preceeding days. There was nothing that perplexed me about the way it was operating. It was apparent to me that the augur was in the trough and that it was operating. I didn't kick the end gate shut, but the latch. I knew how to shut the augur off with the lever at the right of the trough as it faced the wagon. I knew how to shut the tractor off. I knew how to disconnect the pulley in the tractor." This is the only evidence in the record of the manner this accident happened.

The amended complaint charged in the first count that the plaintiff was a minor, seventeen years of age, inexperienced in the use of this mechanical conveyor and did not understand or appreciate the dangers inherent in its use; that it was the duty of the defendant to provide reasonably safe machinery to the plaintiff and to instruct, protect and warn him of the hazards and the means to avoid them as would a reasonable, prudent person under the same circumstances. This count then alleged that defendant failed to instruct or warn plaintiff of the dangers incidental to his employment about said machine and charged that as a result of said failure and while the plaintiff was in the exercise of due care for his own safety plaintiff caught his right leg in the machine and received the injuries for which he seeks to recover. The second count of plaintiff's amended complaint, in addition to the matters alleged in count one, charged that the mechanical conveyor had been designed to operate with the use of a safety device consisting of a bar which extended over and above the metal augur: that this bar had been removed from the machine prior to plaintiff's employment and that plaintiff had no knowledge of its use or that the machine was designed to operate with the protection of this safety device; that in the exercise of due care defendant would have known the absence of the safety device could

cause injury to the plaintiff; that as a result of his negligence to provide a required safety device on said machine the plaintiff while in the exercise of due care for his own safety, was injured.

Counsel for appellant insist that the law required defendant to furnish plaintiff with reasonably safe appliances and a reasonably safe place to work and in this regard was required to exercise the care that an ordinary prudent man would exercise and that this standard of care required defendant to provide and maintain on this elevator the rod over the augur and that defendant was neglegient in omitting it when appellant was put to work there.

The evidence discloses that the elevator was assembled at the farm where appellant was injured before appellant was employed; that among its parts was a wooden rod one inch by two inches and approximately eight feet long and when in place would extend lengthwise above the augur bed and about three feet above the augur and it was to be used to stop the augur. It was left off becuase it was impossible to completely back the wagon up to the blower and raise the end gate of the wagon with the wooden rod in place. Counsel state that appellant was never told about this wooden rod and never knew that the machine came equipped with such a rod and argue that had the rod been in its proper place appellant could not have lowered the end gate of his wagon without moving it away from the elevator and had it been in its proper place and appellant had tried to cross the trough with his leg he would have struck the rod and stopped the augur or if not and he had become caught in the augur he would have been able to stop the augur and thus prevent the extensive injuries which he suffered. Counsel insist that the questions whether defendant in failing to provide this rod on the elevator was negligent and whether appellant was of sufficient age, capacity and experience to appreciate the hazard of working there in its absence are not questions of

law for the court to determine but questions of fact to submit to a jury and in this connection call to our attention Curran v. Western Indiana R. R. Co., 213 Ill. App. 7 at page 16 where it is said: "The question of contributory negligence even as to adults is ordinarily one of fact for the jury, and only when the undisputed evidence shows that the injury resulted from negligence of the injured party can it be held to be a matter of law. Chicago and Elec. Ry. Co., v. Wanic, 230 Ill. 530. As to a child sui juris the standard of care varies with the age, capacity and experience, etc., and it is usually, if not always, a question for the jury."

Count one of the instant complaint is based upon the theory that plaintiff, a minor, was inexperienced and should have been warned that the revolving augur in the trough of the elevator was dangerous. The same theory was advanced in Stahl v. Dow, 332 Ill. App. 233. Counsel for appellant recognize that this case does not support their contention but seek to distinguish that case because in the instant case the plaintiff was not eighteen years of age when he was injured while the plaintiff in the Stahl case was 19 years of age. In our opinion the allegations of the complaint that plaintiff was inexperienced and did not know of the dangers of his employment are not sustained by the evidence. The record shows that he was an intelligent young man and a high school graduate. He testified that he knew the blower was a dangerous piece of machinery; that there was nothing about it which he did not understand; that when he kicked at the latch on the end-gate of the wagon he knew there was a lever at the right of the trough which would cause the augur to stop and he knew how to operate it; that he knew how to shut the tractor off and knew how to disconnect the pulley in the tractor.

The difference in the age of the plaintiff in the Stahl case and the age of the plaintiff in the instant case does not alter the applicable legal principles. In the Stahl case we quoted from Stumpf v. Corn Products Mfg. Co., 155 Ill. App. 194 which held that it was not necessary to place guards over pulleys for the purpose of informing anybody that they were dangerous. We also cited Collins v. Kurth, 247 Ill. App. 156 which held that there can be no negligence based upon a failure to warn when the employee has actual knowledge. In the instant case plaintiff had this knowledge. He knew that if his leg or foot became entangled with the augur he would be injured. He knew how to operate the elevator and how to stop the augur. He was not required to fasten the latch on the end-gate of his wagon but he tried to do it with his hand and when that failed he gave it a kick with his foot. Nor does the fact, under the evidence found in this record, that at the time plaintiff was injured the wooden bar above the metal augur was not in place, alter the applicable legal principles.

In the absence of any testimony sustaining the charge of negligence, thr trial court, under the authority of Stahl v. Dow, 332 Ill. App. 233 where the facts were similar to those disclosed by this record, did not err in directing a verdict for the defendant and the judgment rendered upon that verdict must be affirmed.

Judgment affirmed.

Mr. Justice Anderson took no part in the consideration or decision in this case.

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FILED
MAY 17 1954
JUSTUS L. JOHNSON
Clerk Appellate Court-Second Dist.

Abstract

Gen. No. 10741 Agenda No. 15.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1954.

ELEANOR COLLINS, Plaintiff-Appellant, vs. A. A. TOPCIK, Defendant-Appellee.	Appeal from Circuit Court, Lake County, Illinois.

WOLFE,-- J.

A. A. Topcik resided with his family in the City of Waukegan, Illinois. He employed Eleanor Collins as a nursemaid for his two minor children. She had been employed about fifteen months when she fell and injured herself in the basement of the premises which he occupied. She started a suit in the Circuit Court of Lake County against A. A. Topcik for injuries that she claimed she sustained through the negligence of the defendant. She fell over an electric wire which connected a dehumidifier with an electric socket in the basement of the home. She alleged several specific acts of negligence in her complaint. The defendant filed his answer in which he denied that he was guilty of any negligence that caused the plaintiff's injuries and as an

affirmative defense he alleged that Mrs. Collins was guilty of contributory negligence that was the proximate cause of her injury.

The case was submitted to a jury that found the defendant guilty and assessed plaintiff's damages at $25,000. The Court entered judgment for the plaintiff for this amount. At the close of the plaintiff's evidence, the defendant entered a motion for a directed verdict. This motion was denied. At the close of all of the evidence, the defendant entered a motion for a directed verdict, but the Court took this motion under advisement. After the judgment was entered in favor of the plaintiff, the defendant filed a motion for a new trial, or for a judgment notwithstanding the verdict. Each side presented briefs to the Court and the Court then sustained the motion of the defendant for a judgment notwithstanding the verdict, and entered judgment in favor of the defendant, and it is from this judgment that the appeal has been prosecuted to this Court.

The plaintiff, Eleanor Collins, was a widow about fifty-nine years of age and in November 1949, she was employed by Dr. and Mrs. Aaron A. Topcik, as a governess for their two children aged four and eight. On May 26, 1951, the Topciks had a special luncheon at their home and Mrs. Collins was helping with the dishes after the meal. They ran out of soap and Mrs. Collins volunteered to go into the basement of the home and get a box of Tide, which was located on the north side of the basement next to the wall. As she went down the stairs she turned on the basement light, went over to the

north side, procured the box of Tide and started back, to go upstairs. As she started back she noticed some towels hanging on the clothesline in the basement. Instead of going back the way she came to get the box of Tide, she went under the stairway and tripped over a wire which connected the dehumidifier with an electric current, and was severely injured.

Mrs. Collins testified that during the time that she had been employed by the Topciks she would go to the basement to perform some of her duties like ironing for the children; that she did this on the average of once a week during the whole time that she had been employed; that she was reasonably acquainted with the contents, or location of things in the basement, but did not know the dehumidifier was there. She also states that on her trips down to the basement, she had never attempted to go under the cellarway steps before. The trial court rendered a lengthy written opinion in the case and after reviewing all of the evidence he found that it did not sustain the charge that the defendant was guilty of any negligence that was the proximate cause of plaintiff's injuries, and that the accident occurred in a place which could not be properly called a place of passage in the basement, and that defendant had no notice that any one would ever use the place under the stairway as a passageway, or an aisle for people using the basement. He also stated that by a clear preponderance of the evidence, the plaintiff was guilty of contributory negligence, and that the defendant would be entitled to a new trial in case the judgment were allowed to stand.

The only question in this case is whether there is any evidence in the record tending to prove the allegations of the complaint. The party resisting such motions is entitled to the benefit of all the evidence favorable to him. Where the evidence, taken in its aspects most favorable to the contestant, together with all reasonable presumptions and inferences to be drawn therefrom, tends to establish the allegations of the complaint, the issue should not be withdrawn from the jury. So, a motion for judgment notwithstanding the verdict, under the Civil Practice Act, raises the same question of law and has the same effect as a motion for a directed verdict. Neither the trial court, nor this court on review, is permitted to weigh the evidence to determine where the preponderance lies. In other words, if the plaintiff's evidence makes out a prima facie case, sufficient in itself to go to the jury, the motion must be denied. Evidence favorable to plaintiff's case is all that can be considered on such inquiry. (Tidholm vs. Tidholm, 391 Ill. 19.)

As above stated, we cannot weigh the evidence in this case. Mrs. Collins testified that she had no knowledge of the wire and dehumidifier being beneath the stairway, and her evidence, so far as this appeal is concerned, must be taken as true. When she went to get the box of Tide, she went through a safe passage and if she had returned the same way, she probably would not have fallen, at least she could not have fallen over the wire which caused her injuries. What is negligence is usually a question of fact for a jury to decide. The trial court held that Mrs. Collins was guilty

of contributory negligence, and if we were permitted to weigh the evidence we would be strongly inclined to so hold, but we cannot review the evidence. It is our conclusion that the trial court erred in setting aside the verdict of the jury and rendering judgment in favor of the defendant, but properly granted the defendant a new trial.

The judgment appealed from is hereby reversed, and remanded for a new trial.

Reversed and remanded.

Mr. Justice Anderson took no part in the consideration or determination of this case.

Abstract

Gen. No. 10743 Agenda No. 16.

IN THE

APPELLATE COURT OF ILLINOIS.

SECOND DISTRICT

FEBRUARY TERM, 1954.

LUGENE PATTERSON, Plaintiff-Appellee, vs. ZACK DEMPSEY Defendant-Appellant.	Appeal from Circuit Court, Winnebago County.

WOLFE,-- J.

Lugene Patterson procured a verdict and judgment for $2,500 in the Circuit Court of Winnebago County against Zack Dempsey. The defendant, Dempsey, has perfected an appeal to this Court to reverse the judgment. The complaint alleges that: "On November 19, 1952, the defendant, Zack Dempsey, maliciously and wantonly assaulted the plaintiff and cut him with a knife on his face, chest and other parts of his body. In consequence of and as a proximate result of said assault and battery upon the plaintiff by the defendant, the plaintiff was disabled and prevented from following his regular employment for a period of three weeks and he required hospitalization and medical treatment, which

treatment included the placing of 153 stitches in the face and body of the plaintiff to close the wounds and cuts caused as aforesaid.

"Wherefore, plaintiff prays judgment against the defendant in the sum of Ten Thousand Dollars ($10,000.00) and costs of suit."

The defendant filed a motion and demand for a bill of particulars, which motion was sustained and the plaintiff filed a bill of particulars. The bill of particulars stated: "The assault and battery occurred in Department 30, National Lock Company manufacturing plant, Rockford, Illinois. Moneys expended by the plaintiff for his treatment are:

St. Anthony Hospital, Rockford, Illinois - - - $211.20

Joseph S. Lundholm, M.D., Rockford, Ill. - - - 143.00

E. V. Platt, M.D., Rockford, Illinois - - - - 45.00."

The defendant then filed his answer in which he denied the allegations in the complaint and as a special defense he claimed that what he did was in the necessary defense of himself and in using no more force than was necessary. To this answer the plaintiff filed a reply. The case was submitted to a jury and at the request of the plaintiff, the following special interrogatory was given to the jury. "Did the defendant, Zack Dempsey, commit a wanton and malicious assault and battery upon the plaintiff, Lugene Patterson? Yes No."

To which the jury by their verdict answered 'yes.' The verdict of the jury was signed only by the foreman, but the special

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interrogatory was signed by all of the jurors. It is now insisted by the appellant that the verdict of the jury is null and void because all of the jurors did not sign the verdict.

Part of Section 192 Chapter 110 of Illinois Revised Statutes, which is commonly called the Practice Act, provides as follows: "It shall be sufficient for the jury to pronounce their verdict by their foreman in open Court, without reducing the same to writing if it is a general verdict, and the Court shall enter the same in form, under the direction of the Court."

In the case of Chicago City Ry. Co. vs. Cooney, 95 Ill. App. Page 471, we find this language: "It is argued that the written verdict returned by the jury was insufficient, in that it was signed by the foreman only, and not by all of the jurors. There is no merit in this contention. The return by the foreman in open court, in the presence of all the jurors, was sufficient. A written verdict is not essential and a return of the verdict by the foreman ore tenus is enough. Here, the writing signed by the foreman having been announced in open court as the verdict in the presence of all the jurors, there was a sufficient return of the verdict." The record here shows that the jury returned into open court and presented its verdict and special interrogatory, so it is our conclusion that the verdict is in proper form, and would sustain the judgment rendered upon it.

It is strongly insisted by the appellant that the complaint does not state a cause of action and there is no ad damnum clause in it. We cannot agree with this contention.

In our opinion the complaint clearly states a cause of action. At the time it was filed the defendant, without making any motion to test the sufficiency of the complaint, filed a motion for a bill of particulars, which was granted and a bill of particulars filed. The same must have been satisfactory to the defendant because he filed his answer denying the allegation of the complaint.

In the case of Connett vs. Winget, 374 Ill. Page 531, the same question was presented to the Supreme Court, and in discussing the matter we find this language: "The defendant did not question the sufficiency of the complaint in the trial court until after verdict. All intendments in such event are in favor of the complaint. (Sargent Co. v. Baublis, 215 Ill. 428.) The complaint stated sufficient facts to be good on motion in arrest of judgment. Sub-section 3 of section 42 of the Civil Practice act provides that "all defects in pleadings, either in form or substance, not objected to in the trial court shall be deemed waived." If the defendant desired more specific information his remedy was to seek it by appropriate motion."

This Court in Weinhouse vs. Woodruff, 324 Ill. App. Page 660, had a similar question to decide and we there held, "Verdicts are not to be taken strictly like pleadings. Where there was but one count submitted to jury, with one plaintiff and one defendant, in action to recover broker's commission, a verdict finding defendant not guilty could only be construed to mean that jury had found defendant was not obligated to plaintiff, and trial court properly entered judgment thereon."

The appellant insists that it was improper for the Court to submit to the jury the special interrogatory, as it did not call for a finding of fact on a material question. The complaint alleged that the defendant maliciously and wantonly assaulted the plaintiff and cut him with a knife etc. The interrogatory submitted called for an answer as to whether the defendant did commit a wanton and malicious assault and battery upon the plaintiff. We find that the Court did not commit any error in submitting this special interrogatory to the jury for their answer.

Some complaint is made about the plaintiff's given instructions, but we find no merit in this, as we think the jury was properly instructed. It is argued by the appellant that the verdict of the jury is contrary to the manifest weight of the evidence. We think that the evidence clearly preponderates in favor of the plaintiff. On the whole we find that the defendant had a fair trial and the judgment appealed from should be and is affirmed.

Judgment affirmed.

Mr. Justice Anderson took no part in the consideration or determination of this case.

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45897

YELLOW TERMINALS, INC., a corporation organized under the laws of the State of Delaware, Plaintiff - Appellee, v. WATSON BROS. TRANSPORTATION COMPANY, INC., a corporation organized and existing under the laws of the State of Nebraska, Defendant - Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

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2 I.A. 520

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover double rent under Ch. 80, Par. 2, Ill. Rev. Stat. (1953) and for property damage due to defendant's alleged negligence and wrongful conduct. Prior to verdict a partial judgment for $3,938.33, based on defendant's tender of rent, was entered "without prejudice." Verdict was for plaintiff for $10,700. Judgment was entered on the verdict and defendant has appealed.

Plaintiff became owner of the Chicago properties involved in this suit on July 14, 1947. Defendant was in possession at that time. The purchase price was $107,000. The improvements consisted of a connected garage, office and motor vehicle freight dock. Negotiations for a lease between plaintiff and defendant began after the contract to purchase was made. After getting title, plaintiff was agreeable to defendant retaining possession until defendant's own facilities were constructed. Plaintiff demanded rent of $1,650. per month; defendant offered $850., which was the amount it had paid under a prior lease. The parties could

not agree on rent and plaintiff, on July 30th, demanded that defendant quit. Defendant did not turn over possession until December 4, 1947. Plaintiff moved in on January 19, 1948.

Plaintiff alleged that defendant wilfully withheld possession, "wilfully and wrongfully" damaged the premises and negligently caused a fire which did further damage. At the close of the evidence the court took from the jury the charge of wilful damage. The jury found for plaintiff on the remaining charges.

We shall consider first defendant's contention that the court erred in rulings upon admissibility of evidence.

After gaining possession plaintiff employed a general contractor to repair and improve the premises. The general contractor sent plaintiff's parent company five Requisitions for payment. Each was supported by invoices and bills of sub-contractors. They totaled $15,138.20. The last one was sent on May 7, 1948. Plaintiff's last check in payment was dated August 16, 1948. Of the total sum, plaintiff claimed $8,605.39 was chargeable to defendant. This latter sum is shown on an exhibit captioned Recapitulation. The exhibit, in the record, lists five typewritten items, each similar to the following-- one for each of the five Requisitions -- "Requisition #1, Column 1, $4923.06." These items total $9000.94, but deductions in handwriting on the exhibit result in the $8605.39 figure. Plaintiff's counsel in argument conceded further deductions, on the basis of

evidence, to bring the net claim to $7,769.91. The concessions included $726.00 fire insurance benefits paid plaintiff for damage to the heating plant. In closing argument, plaintiff's attorney told the jury that plaintiff was seeking to recover the net sum of $7,769.91 for "damage as distinguished from ordinary wear and tear."

The Requisitions made no segregation of the items of repair into those of repair to damage from ordinary wear and tear and those of repair to damage charged to defendant. Plaintiff made the segregation at the trial by means of the Recapitulation referred to above. This document was prepared by an engineer, employed by the general contractor, who superintended the work done. Shortly before the trial early in 1952 he went over the Requisitions, separating items falling within plaintiff's charge against defendant from those chargeable to "ordinary wear and tear" and improvements. The first class were translated into the item on the Recapitulation.

This employee testified that he marked the items in the Requisitions with one, two or three dots, depending upon his judgment whether they should be included in plaintiff's charge against defendant, whether there was doubt about it and whether they were due ordinary wear and tear. Thereafter three columns were made of the items by the secretary of plaintiff's attorney at the witness' direction. In column 1 were placed those with one dot; in column 2 those with two dots and in column 3 those with three dots.

This testimony was offered in support of other testimony with respect to the damage, repair of which the items in column 1 represented. The court permitted only the Recapitulation containing the items in column 1 to go to the jury.

Defendant claims prejudicial error because of the trial court's admission in evidence of the Requisition and supporting invoices and bills, the Recapitulation and the cancelled checks.

It was proper for plaintiff to prove the amount it had paid or become liable to pay, and the fact that that amount was the usual and reasonable charge for the labor and material, and that the repairs were such as were necessary to be made. Byalos v. Matheson, 328 Ill. 269. It introduced testimony of the condition of the premises before and after the letting to defendant, that the repairs were necessary and that the charges for the labor and material were fair and reasonable. The question before us concerns proof of the bills and their payment.

Plaintiff presented the Requisitions and supporting documents because the contractor had not segregated the costs as the work was done to accommodate plaintiff's claim. It presented the Recapitulation to make the segregation for the jury. This was done under the theory that the Recapitulation was a summary permitted under an exception to the best evidence rule. Jones on Evidence (4th Ed.), vol. 1, §206. We need not decide whether the Recapitulation amounted to a summary under that exception. If it was, the underlying documents would themselves have to be admissible. Jones on Evidence (4th Ed.) vol. 1, §206.

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There was competent testimony for plaintiff of the condition of the premises when it took title, and of the condition when it regained possession. Plaintiff presented the Requisitions and supporting documents because the contractor had not segregated the costs as the work was done, to accomodate plaintiff's claim. It presented the Recapitulation to make the segregation for the jury. This was done under the theory that the Recapitulation was a summary permitted under an exception to the best evidence rule. Jones on Evidence (4th Ed.), vol. 1, §206. We need not decide whether the Recapitulation amounted to a summary under that exception. If it was, the underlying documents would themselves have to be admissible. Jones on Evidence (4th Ed.) vol. 1, §206. The Requisitions were not proper nor competent to prove damages because they consisted of many bills of sub-contractors and invoices of materialmen, none of whom were called to identify or authenticate the documents (Davidson v. Wisconsin Chair Company, 333 Ill. App. 426) and included many items of improvements and repairs not chargeable to defendant. Consequently the

The Requisitions were improperly admitted because they included many items of improvements and repairs not chargeable to defendant. The checks in payment of the Requisitions were inadmissible for the same reason. The result was to present to the jury items of repair and improvements aggregating more than twice the amount it claimed. We think this might well have interfered with defendant having a fair trial and that the error in admitting the testimony was not cured by admitting the Recapitulation. We conclude, therefor, that the error was prejudicial.

The issue of repairs was not the only one before the jury. Another important issue was that of rental. On this issue plaintiff's testimony was that reasonable rental per month ranged from $1600. to $1800. Plaintiff sought double this rental. Defendant's theory was that $850. was reasonable and its tender of that amount was accepted without prejudice to plaintiff's claim. We have no way of knowing how the incompetent evidence may have misled the jury in deciding the issue. Our Supreme Court recently stated: "Where error is shown to exist, it will compel reversal, unless the record affirmatively shows that the error was not prejudicial." Duffy v. Cortesi, 2 Ill. 2d 511, 517. See also Kirby, et al. v. The People, 123 Ill. 436. The record does not show that defendant was not prejudiced. We think defendant is entitled to a new trial at which proof of payment may be made without the offending documents.

Neither 32 C. J. S., Evidence, §774 nor Wigmore (3rd Ed.), Vol. VII, §§2102, 2116, 2118 is authority justifying the admission of the requisitions or checks. In Wistrand v. People, 218 Ill. 323, an instruction limited the jury's consideration to evidence of the crime in question to limit the

New page 5

Recapitulation was inadmissible. The checks for the full amount were also incompetent.

The result of this procedure was to present to the jury items of repair to plaintiff's premises aggregating more than twice the amount claimed by plaintiff. We think this might well have interfered with defendant having a fair trial. Plaintiff should have foreseen the likelihood of a trial when it regained possession and found the damage. Had it done so it could have had the contractor keep records of work and corresponding statements in a manner consistent with plaintiff's legal theory.

We conclude that there is merit to the claim that defendant was prejudiced by the error in admitting the documentary evidence referred to. The proper proof of damages would obviate the necessity of those documents.

Appellant contends that its holding of the premises was not subject to the double rent statute [Ch. 80, Par. 2, Ill. Rev. Stat. (1953)] because the statute has no application to a defendant who is a tenant at will. The statute on double rent provides in part: "If any tenant or any person who is in or comes into possession of lands... by, from or under, or by collusion with the tenant, wilfully holds over any lands...after the expiration of his term or terms, and after demand made in writing...shall pay...double the yearly value..." Appellant contends that the use of "term or terms" in the statute should be so construed as to render the statute inapplicable unless the parties have initially fixed a definite term and the term has ended by the passing of time.

effect of a confession admitting other crimes, and in that case excluding part of the confession would have excluded all. The case of Finkelstein v. Illinois Central R. Co., 198 Ill. App. 75 is not pertinent. In Vischer v. N. W. Elevated Railroad Co., 171 Ill. App. 544, the "complete statement" rule was applied. The instant question does not involve the complete statement rule, since plaintiff itself put in the complete documents. Here there was no necessity for admitting the prejudicial documentary testimony.

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To support this position it cites Dunne v. Trustees of Schools, 39 Ill. 578, where it was held that a tenant at will is without a "term" within the meaning of a statute requiring notice to terminate a tenancy. From the reasoning of this case he passes to Stuart v. Hamilton, 66 Ill. 253, wherein the double rent statute was held inapplicable to a situation where a lease was forefeited by a landlord instead of coming to the end of the initially defined term by the "efflux of time."

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The first case cited by appellant is inapplicable and the second distinguishable. The Stuart case, wherein the landlord abridged a term initially agreed upon by a lease, does not control this case.

The double rent statute applies to wilful holdovers beyond a term which has expired. Particularly significant is the fact that it provides for "double the yearly value" rather than double the rent agreed upon. The clear suggestion implied from the use of this language is that the statute was intended to apply equally to situations wherein one obtains possession other than by lease providing a definite rent for a definite term. Moreover, it is clear from a reading of the statute that the relationship of the person held liable need not even be, with respect to the landlord, that of tenant. It is clear that such a person, as regards the landlord, would have no term, ended by "efflux of time." We think there is no merit to the contention that the double rent statute is not applicable.

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Plaintiff alleged that during the period subject of this suit defendant did "wilfully and wrongfully injure and damage the said premises and did wilfully, wrongfully and negligently cause a fire...." As has been pointed out, the question of wilful damage was removed from the case. The charges remained, therefor, that defendant wrongfully damaged the premises and wrongfully and negligently caused the fire. These charges are important in considering defendant's contention that error was committed in instructing the jury.

We think the instructions were bound to confuse the jury with respect to the remaining charges. We think we should comment on the instructions in aid of the new trial.

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We think the instructions were bound to confuse the jury with respect to the remaining charges. In the first place, the question of wilfulness was out of the case, so instruction #13 should not have been given. In the second place, the complaint charged negligence only with respect to the fire. Consequently, instructions #5, #9 and #16, which placed on plaintiff the burden of proving negligence without restricting the burden to damage by fire, were erroneous. This is because of the option of a landlord to treat a tenant holding over as a trespasser. Weber v. Powers, 213 Ill. 370, 382; Keegan v. Kinnare, 123 Ill. 280, 288. That trespass is the proper theory of action against a tenant at will for waste see Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95. Having alleged that defendant's negligence caused the fire, however, plaintiff had the burden of proving it and that it proximately caused the fire. Straight v. Odell, 13 Ill. App. 232. The only burden plaintiff would have with respect to the items of damage chargeable not to negligence, but to wrongful occupancy, was to prove the wrongful occupancy and the damage, excepting liability for ordinary wear and tear. The item of ordinary wear and tear

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is an element of reasonable value of use and occupancy. In the third place, instructions #6 and #8 would make a holdover tenant treated as a trespasser liable for "any damage or injury...done by the defendant." These instructions, though not using the words "shall be found guilty" contain equivalent words and are therefor preemptory. Despite the use of the term "done by defendant" they could be misleading so as to make such a tenant liable for ordinary wear and tear and acts of God.

A more definitive trial will result if the plaintiff makes plain in its pleading just what its theory is, and if defendant's theories and instructions of the parties are framed accordingly.

The defendant claims error in the trial court's refusal to take from the jury the question of damages from fire. Under the charges which went to the jury, plaintiff had the burden of proving defendant's negligence proximately caused the fire. Straight v. Odell, 13 Ill. App. 232.

The boiler room was 5 steps below the level of the office. It was about 10 by 12 feet in dimension, having a pit 5 by 5 feet set 6 inches below the floor. In this pit was set the electrically operated oil burner which heated the premises. Water flowed from the street level into the boiler room, the flow being caused by the incline of the adjacent street toward the building. The parties agree that the cause of the fire was a short circuit in the electrical connections of the boiler which resulted from collection of water from the street in the boiler room and the pit.

this page OK to use

The question presented by defendant's claim is whether, applying the familiar rule, there is any evidence tending to prove defendant's negligence.

We disagree with plaintiff that there is evidence tending to show that defendant negligently permitted oil to collect in the boiler pit. The most favorable evidence is that firemen in putting out the fire observed "oil burning all over the pit. Smudge accumulated there, and some dirt burning." This is an insufficient basis for a legal inference that defendant had negligently permitted the oil to accumulate before the fire.

Plaintiff argues that there is evidence of defendant's negligence because it is shown that defendant could have prevented the flow of water into the boiler room by constructing a curb at little cost at the top of the stairway and that defendant wrongfully refused to permit plaintiff, several weeks before the fire, to adjust the grade of the premises and thus prevent the flow of water into the building. We think there is merit to this contention.

There is testimony that defendant knew of the flow of water onto the property, had experienced flooding of the boiler room and knew that the sump pump was not operating and that it was not useful to combat a flood of the boiler room.

It could be argued that plaintiff did not need permission to enter the premises, since defendant, after notice to quit, was no longer a tenant entitled to possession.

There is testimony that defendant refused to honor the right of reentry, and thereby effectively prevented plaintiff from eliminating the cause of the damage.

This being so, we think the defendant should have foreseen that refusing plaintiff permission to make the improvement, it was probable that water would continue to flow and collect in the boiler room, cause a short circuit which would result in damage to plaintiff's property. For this reason we find no error in the trial court's ruling. The fact that plaintiff collected insurance benefits because of the fire is a matter of defense, and plaintiff's counsel asked the jury to deduct benefits from the amount of damage it decided upon. For these reasons we are of the opinion the trial court correctly submitted this question to the jury.

We see no necessity of passing on the contention that there was error in admitting evidence of loss of business of plaintiff's parent company. The testimony was admitted for the purpose of showing plaintiff's need and the reasonableness of the rental term offered defendant. There was no error in the court's refusal to admit certain estimates which defendant sought to introduce as impeachment of plaintiff's testimony regarding damages. On retrial we assume that the attempt to introduce these exhibits will not be made. Also we shall not pass on the questions, whether (a) the testimony of plaintiff's engineer invaded

the province of the jury, or (b) whether defendant's cross-examination of the witness was unreasonably limited. On retrial these questions should not arise.

For the reasons given the judgment is reversed and the cause remanded for new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED.

FEINBERG, P.J., AND LEWE, J., CONCUR.

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46211

ANNA STUEVE, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT
CHARLES HOFFMAN, Appellee.	)	COOK COUNTY.

12 I.A.2d 20

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action. The jury found the defendant not guilty and judgment was entered on the verdict. Plaintiff moved for a new trial on the ground of newly discovered evidence, which it is claimed was not discovered at the trial because plaintiff had been misled by defendant's pre-trial deposition. The motion was denied and plaintiff has appealed from the judgment.

Plaintiff was struck by defendant's automobile at the intersection of Halsted and 51st Streets, Chicago. She had alighted from a southbound Halsted streetcar at the northwest corner. She intended to take a westbound 51st Street car, which was at the intersection. She crossed in front of the Halsted Street car and was within several feet of the east curb when struck by the right front fender of defendant's automobile proceeding north on Halsted. The plaintiff testified that the green light was in her favor. The defendant testified it favored him. The jury in a special verdict found that plaintiff was not in the exercise of due care.

At the trial defendant was called under §60 of the Civil Practice Act [Ch. 110, Par. 184, Ill. Rev. Stat. (1953)] by plaintiff. Then plaintiff testified. These were the only occurrence witnesses in plaintiff's case. Defendant testified and Bruno Smiles was presented as an occurrence witness for defendant. Plaintiff then called defendant again under §60 for the purpose of impeaching Smiles, by confronting defendant with statements made in the pre-trial deposition to the effect that there was no occurrence witness except plaintiff and defendant. This was followed by plaintiff's rebuttal testimony refuting testimony of Smiles that he sought to warn and restrain her from crossing the path of defendant's automobile and that he assisted her after she was struck.

In this court plaintiff does not criticize the verdict. She contends the trial court abused its discretion in refusing to grant her a new trial so that she could produce a witness, Sullivan, whose testimony she claims would cause a different result on retrial.

Both parties rely on criminal cases, as well as civil, for the appropriate rule with respect to new trials for newly discovered evidence. The evidence must appear so conclusive as to probably change the result on retrial; have been discovered since trial; not have been discoverable before trial with due diligence; be material to the issue; and must not be merely cumulative. People v. Marino, 388 Ill. 203. Davis v. Theatre Amusement Co., 351 Ill. App. 517.

The rule is the same in civil cases, except that as great an amount of diligence is not required in criminal cases. People v. Wright, 287 Ill. 580, 587.

The trial court on plaintiff's motion had before it plaintiff's attorney's affidavit as to due diligence in attempting to locate Sullivan, and Sullivan's affidavit relating to what he observed at the scene of the accident.

Sullivan affirms that he did not see the accident. His only statement bearing on the accident is that when the "screeching brakes" drew his attention he saw plaintiff lying on the street and he observed that the traffic lights "on 51st Street were just changing from orange to red." This is the only testimony on the merits which Sullivan would give were the new trial granted. The balance of Sullivan's affidavit goes to the credibility of Smiles' testimony that he warned plaintiff and sought to restrain her, and to the credibility of Hoffman's testimony that Smiles gave him his name and address at the scene.

The court knew the testimony of plaintiff that before she began crossing Halsted Street she saw the light had turned red for Halsted Street, she looked south and saw an automobile about "half the distance down the block" and paid no more attention to it because she had the green light, heard the "screeching of brakes and I started to run" and "ran about three or four steps when I got hit": also that a 51st Street car was at the northwest corner and when she began to cross the lights were just turning red against 51st

Street; also that plaintiff "did say in your office the car had started to cross 51st Street when I started to run"; also that it was in "the middle of 51st Street"; and also that I heard the "screeching of brakes and I looked up as the car was about four or five feet from me and then I started to run." The court would be justified in concluding that Sullivan's testimony of the lights would not probably change the verdict on a retrial.

Sullivan's testimony, were a new trial granted, would impeach the testimony of defendant and Smiles. All agree that Sullivan was at the scene, aided plaintiff and accompanied her to the hospital. His name appeared on the police report. We have not the trial court's estimate of Smiles and Hoffman and accordingly cannot judge as well the probable effect of Sullivan's testimony. The trial court may have decided that the jury would not necessarily have to conclude that either Sullivan or Hoffman and Smiles were deliberately testifying falsely.

The court would not be unreasonable if it concluded that Sullivan's testimony was, on the whole, cumulative of the testimony of plaintiff that no one but she, Hoffman and Sullivan were at the scene, and but further impeachment, added to the questioning of Hoffman by plaintiff's attorney. Graham v. Hagmann, 270 Ill. 252. The cases of Swiney v. Miller, 253 Ill. App. 81 and Knight v. Citizens Coach Co., 307 Ill. App. 251, would not prevent such a conclusion by the trial court.

Defendant shortly before trial told plaintiff's attorney there was no actual occurrence witness to the best of his knowledge and thereafter before trial, Smiles' name came to the attention of defense attorney and plaintiff was not advised of this fact. The court had before it plaintiff's attorney's statement that during the month before trial Sullivan could not be found. It could conclude that had plaintiff been notified of the error in Hoffman's pretrial statement, it would have availed plaintiff nothing. The court knew also when the motion was made that plaintiff had not sought a continuance so that she could have an opportunity to produce Sullivan as a witness. Metz v. Yellow Cab Co., 248 Ill. App. 609, 622. It knew that plaintiff had produced Sullivan's affidavit three days after the verdict.

We need consider no further contention. For all these reasons we are impelled to the decision that the trial court did not abuse its discretion in denying the motion for new trial.

There is no merit in plaintiff's complaint that defendant's instructions unduly emphasized the element of due care.

JUDGMENT AFFIRMED.

LEWE, J. CONCURS.

FEINBERG, P.J. TOOK NO PART.

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46225

HARRY HALGREN and ALMA HALGREN, Appellees, v. JAMES MEYER and JAMES KANE and KANE STORAGE WAREHOUSE, a corporation, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action. Defendant Kane was dismissed. Verdicts were for Harry and Alma Halgren in the amounts of $15,000 and $100 respectively. Judgments were entered on the verdicts and defendants Meyer and the Warehouse Company have appealed.

Plaintiffs were injured on December 11, 1950 in a collision between their passenger automobile and defendants' 1 1/2 ton truck, driven by Meyer, a servant of the Company. Plaintiffs were driving south on Cottage Grove Avenue at about 1:30 P.M. Meyer was driving the truck west on 59th Street, which ends at Cottage Grove at this point. There are safety islands on both the east and west side of Cottage Grove. The position of the island on the west side is unusual. Its north end is located about ten feet south of the south line of 59th Street extended. The collision occurred between the west safety island and the west curb of Cottage Grove Avenue. Both plaintiffs were injured.

Defendants contend the trial court erred in refusing to direct a verdict either on the ground that plaintiffs were guilty of contributory negligence as a matter of law, or on the ground that there was no evidence to establish defendant's negligence.

In disposing of these contentions we apply the familiar rule and taking the evidence favorable to plaintiffs, draw the legal inferences most strongly in their favor, disregarding contradictory or contrary evidence: Plaintiffs were riding south on Cottage Grove Avenue about 15 miles per hour in the lane between the west curb and southbound tracks. Snow was banked at the curb on their right. Their automobile was being driven by Harry Halgren, who at 59th Street was looking forward to the stop light at the Midway 170 feet to the south. Plaintiffs, who were going to pass between the southbound safety island and the west curb, saw no vehicles to their right or left. When their automobile was at 59th Street, defendant's 1 1/2 ton truck "shot out at us, hit our car," and "came quick at us." Defendant Meyer told police he did not see plaintiffs' automobile. The collision took place a few feet south of the south line of 59th Street. The right front of the truck hit the left front side of plaintiffs' automobile. The impact threw the automobile "on its side on a high snow embankment" against the telephone pole.

We think the foregoing testimony tends to prove due care on the part of plaintiffs. It should be kept in mind that 59th Street ended at the east curb of Cottage Grove, so that plaintiffs had nothing to fear from their right as they drove south at 59th Street, for they were in the space between the curb and the street car tracks. They were not, therefor in the same circumstances as plaintiffs in Walker v. Illinois Commercial Tel. Co., 315 Ill. App. 553 were, for in that case

there was a complete intersection. Moreover, defendants' truck could not have had the right of way, as was the case in Kirchoff v. Van Scoy, 301 Ill. App. 366. The case of Crowe Name Plate & Mfg. Co. v. Dammerich, 279 Ill. App. 103, involved a complete intersection, known to be a busy corner and the question was whether the appellant or the appellee was liable for the injuries to a passenger. Here there is no evidence that the corner was a busy one. Van Meter v. Chicago Railways Co. et al., 240 Ill. App. 371 is also distinguishable on its facts. In that case the only testimony was that decedent looked both ways before stepping over street car tracks. The Court said that the inference must be that he looked and saw the street car -- only 15 feet away -- approach, for failure to look would be contributory negligence as a matter of law.

The plaintiffs say they did not see defendants' truck until it "shot out" and was coming "quick" six or seven feet away. From this it does not necessarily follow that plaintiffs did not look for competing traffic. It is inferable in plaintiffs' favor that when they were approaching the north line of 59th Street, defendants' truck had been stopped at Cottage Grove Avenue and was not in range of plaintiffs' vision. True, Harry Halgren was looking ahead to the Midway stop light, but he said there was no traffic to the right or left of him. This indicates that he was not oblivious of his surroundings. Under this view, it could be inferred that defendants' truck, out of range of plaintiffs' vision when the latter were approaching 59th Street, "shot out," after plaintiffs crossed the north line

of 59th Street, from the left rear side of plaintiffs' automobile and, attempting to cross into the westernmost lane of Cottage Grove in front of plaintiffs' automobile, collided with it several feet south of the south line of 59th Street. We conclude that the question of due care was for the jury.

Defendant Meyer told the police that he did not see plaintiffs' automobile "at all" before the accident. This testimony in addition to the foregoing testimony was enough to take to the jury the question of defendants' negligence.

Defendants contend the verdict of $15,000 in favor of Harry Halgren is so palpably gross and excessive that it can only be the result of passion and prejudice and should be reversed.

The medical testimony is that Halgren suffered a "concussion or bruising of the spinal cord" and that a person suffering a fracture of the spinal column without injury to the spinal cord is "very much better off" than if the spinal cord is injured without a fracture. In the opinion of Halgren's experts, his health trouble might or could have been caused by the accident. There was no medical testimony introduced by defendant. The cross-examination of Halgren's witness about his arthritic condition did not develop testimony which would make a finding for Halgren on the cause and extent of his injuries against the manifest weight of the evidence.

Halgren was 70 years old when the accident happened. There was actuarial testimony that his life expectancy was

about nine years. He was retired and not earning pay, having done but odd jobs since 1945. Before the accident his health was good and for about five years he had been active about the house repairing porches and fences, planting and mowing the lawn. Since the accident he is not able to do what he formerly did, "got awful" kidney pains, a "kind of ache" in his side and arm, numbness on the left side of his head and "can't sleep nights."

There is no contention of prejudicial error in the conduct of the trial. Under all these circumstances we see no merit in the contention that we should upset the verdict.

No showing has been made that the verdict for plaintiffs is against the manifest weight of the evidence on the question of liability.

The judgment is affirmed.

JUDGMENT AFFIRMED.

FEINBERG, P.J. AND LEWE, J. CONCUR.

109 A

46248

THELMA BASS, assignee of HENRY A. KLEIN, Appellant, v. RUBIN AGREST, et al., Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

2 I.A. 2d 522

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff, as assignee, instituted an action of scire facias to revive an alleged judgment based on a deficiency decree entered in a foreclosure proceeding. Trial by the court resulted in a finding and judgment in favor of defendants. Plaintiff appeals.

May 10, 1935 a real estate mortgage foreclosure decree was entered directing the defendants Rubin Agrest, Clara Agrest, Morris Agrest, and Rose Agrest, who were found personally liable for the payment of the indebtedness secured by a trust deed, to pay plaintiff Henry A. Klein the sum found due him amounting to $11,114.82. The decree further provided that if the proceeds of sale of the premises involved are insufficient to pay the sum due, "that defendants Rubin, Clara, Morris and Rose Agrest pay the plaintiff Klein the amount of such deficiency."

June 7, 1935 an order was entered approving the Master's report of sale and distribution and a deficiency decree finding that the proceeds of the sale were insufficient to pay the amount due Klein and "ordered, adjudged and decreed that the defendants liable therefor shall pay to the plaintiff Henry A. Klein the amount of the deficiency" in the sum of $2,006.18.

May 24, 1947 plaintiff Klein died. On December 13, 1949, pursuant to an order of the Probate Court of Cook County, the executors of the estate of the deceased made a written assignment to the plaintiff Thelma Bass.

Defendants filed an answer to the scire facias averring among other things that the plaintiff failed to comply with the statute relating to assignments of choses in action.

Plaintiff's amended affidavit for scire facias states that "she is a bona fide holder of an assignment of the judgment which is the basis of this suit." The pertinent provision of Chapter 110, Section 146, Ill. Rev. Stat., State Bar Ed. 1953, reads: "The assignee and owner of a non-negotiable chose in action may sue thereon in his own name, and he shall in his pleading on oath, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title." The law is well-established that in an action by an assignee of a chose in action the plaintiff must allege in his pleading the assignment of the chose in action, the actual ownership thereof by him and how and when he acquired title. (Allis-Chalmers Manf. Co. 297 Ill. 444.)

Since the foregoing section 146 is in derogation of the common law it must be strictly construed and a strict compliance therewith is indispensable. (Winitt v. Kornblith, 248 Ill. App. 108.) Plaintiff contends that the use of the term "bona fide holder" in her affidavit is synonymous with the term "bona fide owner." We disagree. The owner is one

who owns. It may well be that plaintiff here holds the assignment for the benefit of the bona fide owner. In any event, under the authorities last cited plaintiff has failed to comply with the statute. In the view we take of this case it is unnecessary to consider the other points raised.

For the reasons stated, the judgment order here appealed from is affirmed.

JUDGMENT AFFIRMED.

KILEY, J., CONCURS.

FEINBERG, P.J., TOOK NO PART.

54F1

In the

APPELLATE COURT OF ILLINOIS

Fourth District

12 I.A. 2d 522

February Term, 1954

William Lee, Plaintiff-Appellee, vs. Louisville & Nashville Railroad Company, a corp., Defendant-Appellant.	Appeal from the City Court of the City of East St. Louis, Illinois.

Hon. Joseph E. Fleming, Judge Presiding.

Scheineman, P. J.

The plaintiff, William Lee, filed suit against his employer, Louisville & Nashville Railroad Company, under the Federal Employers' Liability Act, and heretofore obtained a verdict and judgment which was reversed on appeal and the cause remanded for new trial, on the sole ground that an instruction tendered by defendant was erroneously refused. Upon re-trial the plaintiff obtained a judgment on a verdict for $18,500 and the defendant again appeals; this time there is no error assigned as to instructions.

The decision on the previous appeal is reported in Lee v. Louisville & Nashville Railroad, 349 Ill. App. 276, to which reference is made for a statement of the evidence, there being no substantial difference on the second trial. It is undisputed that plaintiff is permanently disabled by paralysis, and no attack is made on the amount of the verdict.

The defendant now asserts for the first time that one of the acts of the defendant, as alleged in the complaint, does not amount to a charge of negligence. Aside from the fact that there are other charges of negligence in the complaint, upon which evidence was adduced, this attack on the pleadings comes too late. There was no original motion attacking the complaint in the trial court, nor motion in arrest, so that alleged defects in the form of allegations have been waived and cannot now be considered. Ill. Rev. St. Ch. 110, Sec. 42.

It is also contended that there is such a lack of evidence to support the complaint that the trial court erred in refusing to direct a verdict for the defendant, and in overruling the motion for judgment notwithstanding the verdict. This point has been definitely disposed of on the previous appeal, wherein, on substantially the same evidence this court said "we find no error by the lower court in

its refusal to grant the peremptory instructions or judgment notwithstanding the verdict." The trial court was obligated to comply with that decision, and this court cannot now depart from it, since it is the law of the case. City of Chicago v. Collin, 316 Ill. 104; McCarthy v. Spring Valley Coal Co., 243 Ill. 185.

In arguing the weight of the evidence pertaining to defendant's alleged negligence, the defense presents a logical and reasonable analysis which the jury might properly have accepted and returned a verdict accordingly. There was, however, substantial evidence supporting charges of negligence, of the type which the United States Supreme Court holds must be decided by the jury in F.E.L.A. cases. Blair v. B. & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916.

On the previous appeal it was our opinion that it could not properly be said that the verdict was against the manifest weight of the evidence on this point, so as to justify a new trial, and we remain of that opinion.

Finally, defendant now contends that the evidence does not show the occurrence in question was the proximate cause of plaintiff's injuries. This contention is supported by uncontradicted evidence

that the plaintiff had higher than normal blood pressure, that even prior to his accident, on the same morning, he had said he was not feeling well, and that while being removed and transported to a hospital, he did not mention to his companions that something had fallen on him while he was working alone. There was medical testimony that high blood pressure may cause a cerebral hemorrhage resulting in paralysis. Cross examination of plaintiff's physician also produced some discrepancies. All of this tends to raise an inference that the paralysis may have been the result of something wholly unrelated to plaintiff's employment.

On the other hand, the plaintiff testified that, while attempting to move a heavy object without help, it fell on him, striking his head and shoulder, that he noticed certain ill effects, and presently collapsed on the floor and was unable to move without assistance. The latter part of his statement is fully corroborated. His statements regarding the blow are at least partly corroborated by the physician who examined him shortly thereafter. While the physician reported no scalp wound, he did testify to findings of swelling and contusions of recent origin on the patient's shoulder and chest. Plaintiff also declared that he had been in good physical condition prior to the accident; he was engaged in manual labor, and

walked several miles to work, but had never suffered any ill effects, and had never consulted a physician. Assuming these statements to be true, two physicians gave opinions, based on a reasonable degree of medical certainty, that plaintiff's paralysis was caused by the blow he had received.

The evidence for the plaintiff obviously has established a basis for finding that the injury was directly caused by the occurrence. Apparently the defendant's argument is on the theory that the mere existence of a possible inference to the contrary means that the verdict is based solely on conjecture. It would be more nearly correct to say that, where there are several possible causes of a certain result, none of them supported by evidence, the jury may not conjecture that one of them is the real cause, in the absence of supporting evidence. As stated in 20 Am. Jur. Evidence, Sec. 1178: "A possible cause cannot be accepted by a jury as the operating cause unless the evidence excludes all others or shows something in the way of direct connection with the occurrence."

Since the jury primarily determines the credibility of evidence, it must be accepted that the jury could believe in this case that the plaintiff was accustomed to manual labor and physical exertion

without ill effects, that he then suffered a blow on the head and shoulder, that this was followed by an attack of paralysis, and has left him permanently disabled. The jury could give complete credence to the medical testimony in favor of plaintiff. There being substantial evidence to support the verdict, it cannot be set aside merely because there is contradictory evidence, or other possible inferences. This rule is clearly stated in Lavender v. Kurn (supra), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. We conclude that the question of proximate cause of plaintiff's injury was for the jury to decide, as is the general rule in tort cases, and that the verdict is not contrary to the weight of the evidence in this respect. It follows there is no possibility of entering judgment notwithstanding the verdict.

The trial court did not err in overruling the defense motions, and the judgment is affirmed.

Judgment Affirmed.

Bardens and Culbertson, JJ., concur.

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APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

February Term, A. D., 1954.

Term No. 54F5. Agenda No. 6.

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2 I.A. 2d 523

HENRY BAUER, SR., HENRY BAUER, JR., JOSEPH L. BAUER and MARCUS BAUER, d/b/a BELLEVILLE SHEET METAL WORKS, Plaintiffs-Appellees,	)	Appeal from the Circuit Court of St. Clair County.
vs.	)	
MARGARET SMITH, Defendant-Appellant.	)	

BARDENS, J.

Plaintiffs filed this suit seeking to foreclose a mechanic's lien. Defendant answered denying the right to lien and filed a counterclaim alleging damages to her property because of negligence of the plaintiffs and failure to complete the work. Plaintiffs denied the allegations of the counterclaim and the cause was referred to a Master-in-Chancery who made findings in plaintiffs' favor on both the complaint and counterclaim. Objections and exceptions to the report were overruled and a decree was entered foreclosing the lien and defendant appealed.

Plaintiffs claim that they entered into an oral contract with defendant in November of 1949 for the repair of the roof and guttering on a house owned by defendant and that deliveries of materials and work were

to be performed in such quantities and at such times as might be designated by the defendant.

The house in question was of a brick construction and built many years ago. It had a roof described by one witness as a "mansard" type. The gutters were not overhanging but were built in as an integral part of the roof or house and were commonly referred to as inlaid gutters. They extended out over the sides of the house and were supported by wood construction and wooden braces. The guttering material used, in this case copper, was required to be about three feet wide in order to extend over the outside edge, form the depressed gutter proper, and extend up under the shingles on the roof.

Henry Bauer, Jr. was the partner who had the dealings with the defendant. He testified that his firm was in the sheet metal business, that he was called by the defendant to her home and that he and the defendant together went up on the roof to look over the proposed work. He stated the guttering was in very bad shape and had many holes in it, some of considerable size. The defendant, Mrs. Smith, wanted him to make a firm price on the job which consisted not only of the replacement of the gutter around the house, but also of the repair of two towers and numerous dormers. The plaintiff refused to make a price, but did propose to go fifty feet around the house after which he would submit a bill for payment, and then defendant could use her judgment if she wanted plaintiffs to go

further. Plaintiff testified also that defendant was to pay as the job progressed; that plaintiff did go the fifty feet as agreed and presented a bill for $996.67 on December 5, 1949; that this bill represented some roofing and dormer work as well as work on guttering; that defendant instructed plaintiff to keep on going; that on December 9 defendant paid $250.00 on the bill; that by December 20 plaintiff had expended an additional amount for labor and materials to the extent of $720.14 and that since defendant had failed to make any further payments as agreed, plaintiffs were unwilling to go any further on the job. At this time they had torn out some of the old guttering at the rear of the house and when they discontinued the work, his workmen covered this portion up with waterproof tar paper. No further payments being made, plaintiff filed a claim for lien on January 25, 1950. Complaint was filed May 25, 1950; evidence was heard by the Master in June of 1952; and the decree entered in July of 1953. The plaintiff, Henry Bauer, Jr., also testified that the bills represented the usual, customary, and reasonable prices for labor and materials in the vicinity where the work was done.

There were no witnesses to the oral contract except the witness Bauer and defendant but the employees of the plaintiffs who worked on the job corroborated Mr. Bauer's testimony regarding the work accomplished as well as the covering up of the open guttering when work was discontinued. A witness Griener, a carpenter called in by the plaintiffs to

do some carpenter work necessitated because of the fact that some of the wood had rotted out, also testified for the plaintiffs.

Defendant's testimony was that the oral contract made with Mr. Bauer provided that it wasn't to exceed one thousand dollars; that she told him she would not spend more than one thousand dollars for the job except for the towers; that Bauer stated he was sure the job could be done for no more than eight hundred dollars except for the flat roof and the towers; that if he ran into difficulty it might run as high as one thousand dollars, but if that happened he would get in touch with her; that he could do the tower work for $125.00. Defendant also testified that on certain dates when the work sheets of plaintiffs' workmen showed his men on the job she passed the house and saw no workmen there.

Defendant claims the decree in plaintiffs' favor is against the manifest weight of evidence. To support her theory her brief points out many inconsistencies and contradictions. We have examined the evidence as abstracted and find that there are such inconsistencies and contradictions. We think this is not unusual where witnesses, several years after the occurrences, are testifying from memory concerning details of a construction job. We find also that some of the claimed inconsistencies can be explained. As an instance of the latter, defendant claims that plaintiff testified at least four times that the first bill submitted covered the

first 50 feet of guttering and that yet on cross examination he testified that it covered 150 feet of guttering. We have examined in detail the reference to the 150 foot testimony and find that the plaintiff was then discussing the square feet of copper used and the number of pounds per square foot. Plaintiff's testimony in this instance was to the effect that the copper guttering was three feet wide and that on the fifty foot stretch there would be 150 square feet of copper used.

It would unduly lengthen this opinion to discuss in detail all the evidence pointed out by the defendant in her brief and argument. We do find that all of these matters were presented to the Master and the lower court in the objections and exceptions. The ultimate questions determined involve the credibility of the witnesses and weight to be given to their testimony. This was decided in plaintiffs' favor and we cannot say that the decision is against the manifest weight of evidence.

Defendant further contends that plaintiff should not recover because when they discontinued work on December 20, 1949, the contract was not substantially performed, citing Wolf and Co., 252 Ill. 491, and Errant vs. Columbia Western Mills, 195 Ill. App. 14. We think she answer to this contention is furnished by plaintiffs' brief citing Paragraph 4 of Chapter 2, Illinois Revised Statutes, which provides that the contractor may discontinue work upon breach by the owner in failing to pay the contractor

money justly due him. See also Cooper vs. Palais Royal Theatre Co., 242 Ill. App. 184, 195.

We turn now to the counterclaim of the defendant. She claims that when plaintiffs discontinued the work on December 20 they had torn out old inlaid guttering in the rear of the house and left that portion in such condition that water and snow seeped into the interior of the house thereby damaging plaster and paper, warping woodwork and floors and causing other damage. Defendant's own testimony supported these contentions. She called other witnesses regarding alleged damage but they were not familiar with the premises on material dates and gave her no support.

On the other hand, plaintiff Henry Bauer, Jr. and the employees of plaintiff who testified in his behalf, and the witness Griener, all contradicted the contentions of the defendant and testified concerning the conditions of the house in November of 1949 when the work was started. They described the fallen plaster and paper, the broken window panes, the buckets and pails set in the different rooms to catch water and the run-down conditions of the interior generally. They also testified concerning the holes in the guttering and the roof and the leaky conditions thereof at that time. Plaintiffs also produced evidence as hereinbefore set out that on December 20 when their workmen discontinued the job all of the torn out guttering was covered with water-proof tar paper.

The Master's findings and conclusions were

in favor of counterdefendant on this counterclaim and his report was approved by the chancellor. These findings were amply supported by the evidence. The decree of the lower court will be affirmed.

Decree affirmed.

Scheineman, P. J., and Culbertson, J., concur.

Publish Abstract Only.

118 A

46227

CARL MOORE and EVELYN MOORE, Appellees,	)	APPEAL FROM SUPERIOR
v.	)	COURT, COOK COUNTY.
BERNARD MILLER, Appellant.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from two judgments rendered on verdicts in a personal injury case, one for Carl Moore in the sum of $15,000, and one for Evelyn Moore, his wife, in the sum of $5,000. The defendant in his brief assigns as an error that the verdicts are contrary to the manifest weight of the evidence, but his counsel in his oral argument stated he did not rely on that issue and would confine his argument to the point that the verdicts were excessive.

The character of the accident is to some extent relevant to the nature of the injuries and we will therefore give a brief summary of it. On July 20, 1949 plaintiff Carl Moore was driving his wife's automobile west on 16th street, near Fifty-fourth avenue in Cicero. His wife was in the car with him. Defendant was driving an automobile east on 16th street. A young lady was sitting in the front seat and a young man was sleeping in the rear seat with his head resting on the shoulder of a girl sitting with him. Plaintiffs' automobile was on the right side of the street traveling at a moderate rate of speed when the driver observed defendant's car coming over on his side of the road. Plaintiff Moore slowed his car to

a speed estimated at five miles per hour, but defendant's car crossed over the center line and struck plaintiffs' car on the left front side with great force. The collision threw Mrs. Moore through the windshield and knocked her husband unconscious, producing serious injuries to both of them. While the evidence was contradictory, the account we have given is established by evidence more than sufficient to support the jury's verdict, and there is no adequate explanation of defendant's conduct.

The damages awarded to Mrs. Moore included damages to her car in the sum of $544.62. Her brother, Dr. Arthur A. Thieda, was the attending physician for both Mrs. Moore and her husband. He rendered a bill for $450 for services to Mrs. Moore, making a total of approximately $1,000 in specific damages. According to the doctor's testimony, Mrs. Moore suffered a concussion, glass lodged in her eyes, face, chest and arms, and she suffered from a swelling in her shoulder and from numerous cuts and lacerations elsewhere on her body. She suffered pain in the back of her neck. She developed severe headaches in the frontal and occipital part of her head, which had not disappeared at the time of the trial, became and still is extremely nervous and irritable, had high blood pressure, and sustained a loss of weight from 138 to 118 pounds. According to her testimony, supported by that of her husband and Dr. Thieda, she has suffered from fainting spells which occur as frequently as twice a week. X-rays

revealed a narrowing between the fifth and sixth cervical vertebrae and an abnormal spur of bony substance on the lower margin of the fifth vertebrae. Her attending physician testified that the conditions described were the direct result of the accident. Dr. Donald Miller, a physician and surgeon specializing in orthopedics, testified in answer to a formal hypothetical question, that there might be a causal connection between Mrs. Moore's present condition and the accident. Dr. Albert C. Fields, a witness for defendant, testified to the contrary.

Carl Moore was 41 years old at the time of the accident. He had been employed as a supervisor at the Western Electric Company for eighteen years. He lost seven teeth as a result of the accident, his mouth was bloody, his shoulder blades sore, his chest crushed and bruised, both knees were swollen, and there were lacerations on his legs and shins. After the accident he had difficulty in walking any distance without stopping to rest. He still had that difficulty at the time of the trial. He lost ten days from work and then took a three-week vacation, during which he stayed home and rested. He had a clicking action in his right shoulder joint. Functions which he had formerly performed with his right hand he now does with his left hand. He has suffered great pain. His legs have a waxy appearance. There were lacerations on his head and he has headaches in the nape of his neck three or four times a week. He was

treated by Dr. Thieda and was still under his care at the time of the trial. His work involved a great deal of walking, ordinarily eight to ten miles a day. At the time of the trial he could not cover a third of that distance. Dr. Miller examined Mr. Moore shortly before the trial, conducted tests, and took x-rays. He made a diagnosis of subluxation, which is a partial dislocation of the shoulder joint, and of osteochondritis, which is an irritation of the bone and cartilage due to trauma, and a thickening of the capsule of the shoulder, evidenced by deformity and elevation. He made a further diagnosis of deep traumatic fibrositis or injury to the muscles and ligaments of the neck and of vasospasm of the blood vessels and arteries of the legs. He testified that the best treatment for the leg condition would be an operation known as a sympathectomy, consisting of cutting the nerve of the leg through the root behind the peritoneum. Such an operation would not afford total relief, but improves circulation. At the time of the trial the total liability for doctor and dental bills for Mr. Moore appears to have been about $800.

Complaint is made by defendant that the court permitted plaintiffs to impeach their own witness. A police officer was put on the stand by plaintiffs. He was asked about physical facts surrounding the accident. On cross-examination defendant elicited from the officer the statement that Carl Moore had told him he was driving ten to fifteen miles an hour at the time of the accident. Subsequently,

Moore was asked by his counsel whether he had in fact made that statement to the officer and he replied that he had not. Thereby, defendant says he was impeaching his own witness. It is true that a party who calls a witness vouches for his veracity and may not thereafter directly impeach him, but he is permitted to show that a fact to which the witness has testified, whether it be an adverse admission of one of the parties or any other fact, is not true. U.S. Brewing Co. v. Ruddy, 203 Ill. 306, 309.

Complaint is made of counsel's argument. In our opinion, he went considerably out of bounds. He speculated on future economic possibilities, such as the return of a depression, in which event plaintiff might lose his job. In substance, he asked the jury to compensate plaintiff Carl Moore for a loss which might occur to him in the event there should be a depression. He justified this on the ground that when competition for jobs returns, plaintiff's limitations may result in his being out of work. This is highly speculative. On the same basis, defendant might have argued that a period of more stringent shortage of supervisory personnel may come about and plaintiff thereby improve his economic condition. These are not facts which the jury could find. A great debate occurs perennially among the country's economists as to whether the current year is or will be one of recession, depression, or greater prosperity. It has spread from the economists to candidates for political office. In argument with respect to damages, counsel must not play on

the sympathy of the jury, but must confine himself to the facts supported by the evidence. When we take into account the fact that Carl Moore lost only five weeks of work and the fact that a considerable portion of the injuries claimed are supported by subjective evidence only, we are of the opinion that the verdict in his favor is excessive. This could well have been due to counsel's improper argument. If it were not for the fact that the liability is clear and that certain injuries were well established, we would consider counsel's remarks reversible error. However, it is error which can be corrected by a remittitur. Upon the filing of a remittitur of $3,000 by Carl Moore in the office of the clerk of this court within ten days, thereby reducing the judgment to $12,000, judgment will be affirmed; otherwise the judgment as to him is reversed and the cause remanded, with directions to proceed in a manner consistent with the views herein expressed. As to Evelyn Moore, the verdict in her favor included approximately $1,000 of damages to her car and payment for medical attention, and taking that into account, we do not think the verdict in her favor is excessive.

Other errors complained of by defendant are highly technical and are not a basis for reversal.

Judgment as to Carl Moore affirmed upon the filing of a remittitur. Judgment as to Evelyn Moore affirmed.

Robson, J., concurs.
Tuohy, J., took no part.

119 A

46072

HERMAN CORRADO, Appellant,	)	
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
CALUMET ENGINEERING COMPANY, a corporation, and MARSHALL J. JOYCE, Appellees.	)	

2 I.A.2d 524

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his action to recover money damages for injuries sustained in a collision involving the automobile which he was driving and a truck owned and operated by the defendants. A jury returned a verdict of not guilty. Judgment was entered on the verdict and plaintiff appealed.

Plaintiff first contends that the verdict of the jury was against the manifest weight of the evidence. The case on behalf of the defendants, which the jury believed, follows. Joyce was on November 6, 1948, in Salem, Wisconsin, on business. He left Salem about four o'clock in the afternoon to drive to Hammond, Indiana. It was a clear, cold day. The sun was out. He was driving a Ford tractor pulling a low-bed trailer, which had a cluster of three red lights, together with two reflectors, on the rear just above the axel. The tractor has a cab in which the driver rides, with the motor under the floor. When it was getting dusk, which was several miles from where the accident took place, he switched on the lights on the truck. He checked them and found they were all in good working order. At about 5:30, defendant Joyce noticed smoke coming from under the driver's

seat. It filled the cab, got in his eyes so he couldn't see, because the doors and windows of the cab were closed. He opened the door, brought the vehicle to a stop, but did not shut off the ignition. He was temporarily blinded and couldn't see the shoulder of the road. He got out of the cab, and when his eyes cleared, ran around to the front of the truck. He saw smoke coming from underneath the seat. He pulled the seat out and saw that insulation was burning on the wires. He took some tools that were there and lifted the wire where it was touching, removed it and eliminated the short. This did not disturb the lights. They were all on one circuit and not disconnected. He stepped back a foot or two and looked at the back of the cab and could see that the tail lights were still on. He then ran to the front of the truck when he noticed a car approaching from the north. It came closer, pulled out, and went around him to the south. He started to step up on the running board to get fuses to set out. He then observed plaintiff's car coming about a hundred yards to the north. He didn't have time to light a flare. The plaintiff's car kept coming, didn't slow down, didn't pull out. He realized that if plaintiff swerved to miss the truck he would hit him so he stepped back on the running board and plaintiff ran straight into the rear of the trailer-truck. There was a loud and violent crash when plaintiff hit the truck. It all happened with great rapidity. The frame of the truck was broken in two. It was made of channel iron and the truck was resting on the concrete. It

was barely dark. One could see for quite a distance without any lights.

The road where the impact took place is a two-lane highway approximately 16 to 20 feet wide. There is a shoulder on the right-hand side of the road estimated to be from four to ten feet in width. About 100 feet north of the point of collision there is the bottom of a fifteen degree rise in the road. Defendants' truck was stopped in the middle of the southbound lane. One of plaintiff's witnesses, a deputy sheriff, corroborated defendant Joyce's statement that it was barely dark and one could see a block or two without any lights if one were walking on the sidewalk or along the road.

The case on behalf of the plaintiff was that he had left his home at about 4:45 in the afternoon. He had seen the tractor and trailer of the defendants in a gas station previous to the accident. Just prior to the collision he was driving along at about 45 to 50 miles an hour. His lights were on. Traffic was light and there were no cars in front of him. It was very dark and his lights illuminated the road about sixty feet ahead. He first saw the trailer when he was about sixty feet from it. He applied his brakes. He was partially on the northbound lane when he struck the trailer in the rear. He did not see any lights on the trailer.

John Anderson, a witness for the plaintiff, who did not see the accident but arrived later, testified that there were no lights on the trailer and he spoke to defendants' truck driver about it. The deputy sheriff, plaintiff's witness,

did not remember whether the lights were on the trailer or not.

Plaintiff makes two contentions in support of his argument that the verdict was against the manifest weight of the evidence, (1) that defendant Joyce should have pulled off the road, and (2) that there were no lights on the truck and no flares placed on the highway.

It is apparent from the facts that defendant Joyce was confronted with a sudden and unusual emergency--a fire underneath the cab in which he was sitting.

The question of due care in not pulling the truck off on the shoulder of the road, whether the truck was visible, whether the lights were on, and whether defendant Joyce had time to put out the flares were controverted points. They were issues of fact for the jury to decide. The jury, who were the judges of the credibility of the witnesses, gave credence to the evidence of the defendants rather than that of the plaintiff. The trial judge, who heard and saw the witnesses, approved the verdict by his denial of plaintiff's motion for a new trial. When the testimony is contradictory this court will not substitute its judgment for that of the jury, unless the findings are manifestly against the weight of the evidence. Bliss v. Knapp, 331 Ill. App. 45; McMillian v. McLane, 338 Ill. App. 514. In view of the facts heretofore stated, we cannot substitute our judgment for that of the jury. The verdict was not against the manifest weight of the evidence.

Plaintiff contends that the court committed reversible error by giving a certain peremptory contributory negligence

instruction which completely omitted the element of proximate cause. The instruction reads as follows:

> "The Statute of this state provides that no person shall drive an automobile upon any public highway at a greater speed than is reasonable and proper, having regard to the traffic and the use of the ways, or so as to endanger the life or limb or injure the property of another, and if you believe from a preponderance of the evidence in this case that the plaintiff at the time of the collision was driving his automobile at a greater speed than was reasonable and proper, having regard to the traffic and the use of the ways, or so as to endanger the life or limb or injure the property of another, and if you believe from a preponderance of the evidence in this case that the plaintiff at the time of the collision was driving his automobile at a greater speed than was reasonable and proper, having regard to the traffic and the use of the highway at the time and place in question, <u>and that thereby</u> the plaintiff contributed to the accident, then under the law you should find the defendants not guilty."

Defendants contend that the use of the language "and that thereby" (which we have underscored) has a similar meaning and is therefore sufficient to overcome this objection. The use of this language was approved in the case of <u>C. & E. I. R.R. Co. v. Crose,</u> 214 Ill. 602, 614, in which the same point was raised. To the same effect is <u>Union Rolling Mill Co. v. Gillen,</u> 100 Ill. 52. In the cases cited by plaintiff in support of his contention, the words "and that thereby" were not substituted for "proximately contributed." They, therefore, are not in point. We conclude that the use of the language "proximately contributed" is preferred, but the substitution of "and that thereby" in lieu of it is not error.

The judgment of the trial court is affirmed.

Judgment affirmed.

Schwartz, P. J., concurs.
Tuohy, J., took no part.

46218

120 A

MARK CURRY, Appellant,	)	
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
N. L. BLACKMAN REALTY COMPANY, Inc., EUGENE M. JOSEPH, GRACIA L. BLACKMAN and ELAINE A. BLACKMAN, Appellees.	)	

2 I.A.2d 525

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, Mark Curry, filed his complaint at law to recover damages, attorney's fees and costs for overcharge in rent under Section 205 of the Federal Housing and Rent Act of 1947, against defendants N. L. Blackman Realty Company, Inc., Eugene M. Joseph, Gracia L. Blackman and Elaine A. Blackman. Defendants filed a motion for summary judgment supported by an affidavit. The plaintiff filed an answering affidavit. The respective parties stipulated to the facts. The court heard the case on the affidavits and the stipulation of facts and found that the landlord-tenancy relationship between the defendants and the plaintiff is exempted from control by virtue of Section 39 (a) of the Controlled Rent Regulation, as amended, and entered judgment for the defendants. Plaintiff contends that the stipulated facts do not exempt the defendants from control under the Housing and Rent Act in that it was rented on the basis of twelve apartments and not the number of rooms contained in the apartments.

The essential facts are that the defendants owned a

certain building in Chicago, Illinois, which had been registered with the Housing Expediter at $80 per month when the Housing and Rent Act first went into effect. In November of 1948 plaintiff leased the premises for $200 per month, a sum of $120 in excess of rent for which it was registered. Plaintiff had filed registration statements with the Office of Rent Stabilization indicating he was subletting 43 rooms. It was stipulated at the trial that the premises consisted of twelve apartments with an aggregate of 40 rooms and that more than 25 rooms of the premises leased by plaintiff were sublet. Section 39 (a) of the Controlled Rent Regulation reads as follows:

> "Exempted Housing, these regulations to not apply to the following:
>
> "(a) Entire structure of premises wherein more than 25 rooms are rented or offered for rent by any lessee, sublessee, or other tenant of such entire structure or premises."

The section clearly refers to rooms and not apartments. Edwards v. Shevitz, 101 Fed. Supp. 166.

In the case of Hussos v. Vasel, 346 Ill. App. 12, this court said at page 16:

> "And in determining whether premises fall within the regulation and therefore are exempt from the Act, only the rooms actually rented or offered for rent, are to be taken into consideration, and those occupied in good faith, by the lessee, sublessee, or other tenant as a residential apartment are to be excluded from consideration."

This court said this rule was laid down in Popplewell v. Stevenson, 185 Fed. 2d 111, and also Mortgage Underwriting

& Realty Co. v. Bowles, 150 Fed. 2d 411. Applying this statement of the law to the stipulated facts, we conclude that this was exempted housing under Section 39 (a).

The decision of the trial court is affirmed.

Affirmed.

Schwartz, P. J., concurs.

Tuohy, J., took no part.

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46244

FORD HAYES, Appellee,	)	
v.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
UNITED APPLIANCE & FURNITURE CO., Inc., on appeal of CHARLES MARKEL, d/b/a United Appliance & Furniture Co., Inc., Appellant.	)	

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

Ford Hayes, plaintiff, filed his action to recover the sum of $2,025 from the United Appliance & Furniture Co., Inc., and Charles Markel, doing business as United Appliance & Furniture Co., Inc., for services rendered as defendants' manager. United Appliance & Furniture Co., Inc., nonexistent as a corporation, was dismissed. Trial was had before the court without a jury, and judgment was entered for the plaintiff in the sum of $300 and costs, from which judgment defendant appealed. Plaintiff filed no brief in this court.

Defendant contends that the judgment of the trial court should be reversed for two reasons: (1) That it is against the manifest weight of the evidence, and (2) the judgment for $300 has no basis for computation in the record.

The testimony on behalf of the plaintiff reveals that he claims to have been hired by the defendant to manage his store, which was known as the United Appliance & Furniture Co., Inc. He had a conversation with defendant and Henry Heise at the home of Charles Blank in March, 1950, where

it was agreed he would be paid $75 a week and receive $500 worth of stock in the company. These were the only people present and the agreement was reached at that time. He started work on May 1 and worked from eight o'clock in the morning until four o'clock in the afternoon six days a week. He did this until November 6, 1950, when he suffered a stroke. He started as president but was moved back to vice-president when defendant hired another man. He was prevented from making sales by another man who stood at the door and met all the customers. When asked to detail what he did, he said he opened the gates, swept the floors, made deals and assisted in sales. He testified that there were four weeks in the summer that he did not work, but that he was employed at Sportman's Park as a barber. He said he hired an office girl, Susie Minifee, and later hired his son, who was a student, to assist her after school hours, both of whom were to assist him in his work. He denied he received any compensation, but then admitted he received approximately $100 in commission checks that were mailed to him. On cross-examination he admitted he received four checks totaling $214.86, the last of which was dated June 17, 1950, and contains the notation at one end: "Bills to date per itemized account of same date and commissions." It was endorsed by him.

Susie Minifee testified that plaintiff had hired her about May 1. She overheard a conversation early in May between the plaintiff and defendant wherein defendant

requested plaintiff to become the manager of the store. Catherine Hayes, plaintiff's wife, testified that in April of 1950 defendant and Mr. Heise had a conversation in their home where plaintiff was hired as the manager of defendant's business; that they had another conference at their home in May where plaintiff was urged to continue as the manager of the business. His wife admitted that during the summer of 1950 he worked as a barber at Hawthorne Race Track from May to June; at Arlington Park Race Track from the last of June to August, but denied that he worked at Sportsman's Park Race Track.

The case on behalf of the defendant was that he never hired plaintiff as manager of the store; that when it first opened one Kenny Heise was the manager and later Frank Bain; that he first met plaintiff about the middle of May of 1950; that plaintiff later asked him for a full time job to begin at the end of the racing season. Defendant told him that he would not discuss it with him at that time but that if he could make any sales in the interim he would be glad to pay him a commission.

Plaintiff did sell some goods and was paid commissions totaling $214.86 by checks. Plaintiff later came and asked him if he could use a good office girl who had worked for him at the race tracks by the name of Susie Minifee. Defendant hired her. Defendant denied that he at any time had any conversation whereby he agreed to pay plaintiff $75 a week, give him $500 in stock in the company, and make him the

president.

Charles Blank, a witness for the defendant, testified he met plaintiff with a Mr. Heise in May; that Heise agreed to let plaintiff sell on a commission basis but nothing was said about hiring him in any other capacity or paying him a salary. Several other witnesses testified for the defendant, all of whom denied that the plaintiff was employed on a salary basis by defendant.

An examination of the testimony shows that the plaintiff stated he was employed in March as president, later was reduced to vice-president. His witness, Susie Minifee, stated that he was employed in May as manager, and his wife told an entirely different story on the same subject. His duties that he described were not compatible with president, vice-president or manager. The plaintiff claimed to have worked full time and then on cross-examination admitted he worked at Sportman's Park Race Track. His wife said that he worked at Hawthorne and Arlington Park and not at Sportman's.

Introduced in evidence by defendant were commission checks totaling $214.86, which plaintiff at first denied receiving and then admitted. All of defendant's witnesses substantiated his story. Plaintiff's testimony is contradicted by his own witnesses. Much of it is highly incredible and preposterous.

A reviewing court will not usurp the province of the trial court in passing upon conflicting questions of fact but

it should not hesitate in setting aside judgments where the testimony of plaintiff is contradicted and where the attending circumstances reflect considerable doubt upon his testimony. Reinowski v. Richardson et al., 279 Ill. App. 633. As a result of our review of the facts, we are clearly of the opinion that the judgment of the trial court was against the manifest weight of the evidence.

Our examination of the testimony reveals no computation or other basis upon which the court could validly enter a judgment for $300. Plaintiff was either entitled to $2,025 or nothing. In view of our holding that the judgment of the trial court was against the manifest weight of the evidence he is entitled to nothing. The judgment for the plaintiff in the sum of $300 is reversed and judgment entered for the defendant and for his costs.

Judgment for plaintiff in the sum of $300 reversed and judgment entered for defendant and for his costs.

Schwartz, P. J., concurs.

Tuohy, J., took no part.

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46290

COOL RAY ALUMINUM AWNING CORPORATION, Appellant,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
CHARLES F. MADARY and ANNA G. MADARY, Appellees.	)	

12 I.A.2d 526

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

This appeal is taken from an order of the Municipal Court of Chicago vacating a judgment for plaintiff in the amount of $1,657.50 (including attorney's fees of $157.50), and entering judgment for defendants. No appearance or brief has been filed here on behalf of defendants.

The record shows that on November 15, 1952 a written agreement was entered into between Arthur J. Balderman, doing business as Gay Aluminum Awnings, and the defendants for the purchase and sale of 24 Stoaco combination storm windows for the price of $984, an advance payment of $50 being acknowledged and credited in the contract, the balance payable in 36 equal monthly instalments of $28.11. Thereafter an additional 73 windows were purchased as evidenced by written contract for a price of $2,516. Balderman testified that after the execution of the foregoing contracts he informed defendants he could not get proper service from the Stoaco Company but would install Stormmaster Stoaco-type windows and submitted a new contract for 97 Stormmaster Stoaco-type windows for the price of $3,500, including without charge two Stormmaster aluminum doors; that defendants signed the new contract and

promised to destroy the two prior contracts which had provided for the installation of Stoaco windows. This new contract was thereafter on January 12, 1953 assigned to plaintiff. Defendants paid toward the purchase price the sum of $2,000 in instalments of $50, $950 and $1,000, the last mentioned instalment having been paid after most of the windows were installed, but refused to pay the balance of $1,500, for which sum, plus attorney's fees, judgment by confession was thereafter entered.

There seems to be no dispute under the evidence that each of the foregoing contracts was executed by the parties here involved; that the Stormmaster Stoaco type windows were delivered by plaintiff's assignor and installed on defendants' buildings; that partial payments in accordance with the terms of the contract were made after a portion of the windows had been installed and that no complaint was made of the workmanship or materials so delivered and installed. Defendants in their own behalf were permitted to testify without objection that they understood Stoaco windows and not the Stormmaster windows were to be installed. This testimony is clearly at variance with the terms of the written instrument which they signed. There was no testimony whatsoever that they were induced to sign this agreement by any fraud or other artifice, nor that they were unable to understand the clear language of the instrument. We are of the opinion that the testimony of the two defendants has no probative value against the clear and unmistakable language of the written instrument. Further-

more, it is to be observed that defendants make no specific objections to the windows installed other than that the windows did not bear the name "Stoaco," but rather bore the name "Stormmaster." There is no evidence in the record as to the specific characteristics of each type of window, or that the type delivered and accepted was in any way inferior to the type claimed to have been ordered.

The evidence indisputably shows that defendants have accepted the benefits of this contract which was voluntarily signed, and it was clearly erroneous for the Municipal Court to set aside the judgment by confession theretofore entered. The order of August 14, 1953 vacating the judgment in favor of plaintiff is reversed and the cause is remanded with directions to vacate the orders of June 18, 1953 and August 14, 1953, and to permit the judgment by confession in favor of plaintiff to stand and to let execution issue thereon.

Order reversed and cause remanded
with directions.

Schwartz, P. J., and Robson, J., concur.

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FILED
MAY 1 1954
JUSTUS L. JOHNSON
Clerk Appellate Court-Second Dist.

Gen. No. 10749 Agenda No. 21.

2 I.A. 52

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1954.

FRED HEBEL, Executor of the Estate of EDNA GUILDSTRAND HEBEL, Deceased, Plaintiff-Appellant, vs. HINSDALE SANITARIUM AND HOSPITAL, a Corporation, also known as HINSDALE SANITARIUM AND BENEVOLENT ASSOCIATION, a Corporation, Defendant-Appellee.	Appeal from the Circuit Court of Du Page County.

WOLFE,-- J.

Fred Hebel and his wife, Edna Guildstrand Hebel on August 22, 1949, went to the Hinsdale Sanitarium and Hospital, a Corporation, in Du Page County, Illinois. Their intention was for Mrs. Hebel to remain as a patient in the Hospital for treatment. It is alleged that she was accepted as a patient by the sanitarium and on the 25th day of August, 1949, she wandered away from the hospital and was killed by a railway train.

Fred Hebel was appointed administrator of his wife's estate and filed a suit in the Circuit Court of Du Page County,

against the Hinsdale Sanitarium, alleging that his wife was killed by the negligence of the sanitarium. The complaint charges that the hospital accepted Mrs. Hebel as a patient; that she was suffering from physical disorders and was mentally and physically unable to exercise sound judgment, and that the mental condition and inability of the deceased was known to the defendant, or by the exercise of ordinary care should have been known to the defendant at the time she was accepted by the defendant as a patient, and it was the duty of the defendant to exercise ordinary care to protect her from harm, and to prevent her from going into a place of danger.

The third paragraph of the complaint is as follows: "The plaintiff further alleges that the defendant wholly failed in its duty and undertaking to treat, administer to, care for and protect the said Edna Guildstrand Hebel, and carelessly and negligently allowed her to go about unattended and unprotected, and that the said Edna Guildstrand Hebel, because of and as a proximate result of the failure of the defendant to treat, administer to, care for and protect her, on to-wit, the 25th day of August, A. D. 1949, escaped and wandered from said hospital into a place of danger, to-wit on a certain railroad track in the Village of Hinsdale, County of Du Page, and State of Illinois, at which time and place she was struck by a certain railroad train and instantly killed." Then follows the former allegations and ad damnum clause of $15,000.

The second count of the complaint is the same as the first with the exception of Paragraph 2 of the amended

complaint, which is as follows: "That the said Edna Guildstrand Hebel was ill, and that the defendant undertook to render medical treatment to her, and that the defendant in and about treating the said Edna Guildstrand Hebel caused to be given to her brain and nervous system certain severe shocks and caused certain drugs to be administered to her, and that as a proximate result thereof she was rendered unable voluntarily to form and act upon good, sound judgment, and was unable to exercise ordinary care for her own safety, and that said mental and physical condition and inability of Edna Guildstrand Hebel, resulting from said treatments, was known to the defendant, or by the exercise of ordinary care should have been known to the defendant, and it then and there became and was the duty of the defendant to exercise ordinary care to protect the said Edna Guildstrand Hebel from harm, and to prevent her from going into a place of danger." Then follows the allegations as in Count 1. The defendant entered its motion to strike the amended complaint. This motion was sustained, the cause stricken and suit dismissed, and judgment entered in favor of the defendant. It is from this judgment that the appeal has been perfected to this Court.

It is seriously insisted that the amended complaint states a good cause of action, and that the Court erred in sustaining the defendant's motion to dismiss the suit. He also insists that the proximate cause of the injuries is a question of fact to be determined by the jury from a consideration of all the attending circumstances. This is true as a general rule of law, but where there is a motion to strike the

complaint, the facts well pleaded are admitted to be true, then it becomes a question of law whether the facts as alleged and well pleaded taken as true, states a good cause of action. Brown vs. Jacobs, 367 Ill. 545, Ryan vs. City of Chicago, 369 Ill. Page 59.

An examination of the complaint shows that it is charged in the Third Paragraph of each count, that the defendant failed in its duty to treat, administer, to care for and protect the deceased, and carelessly allowed her to go unattended. It does not say in what manner the defendant failed to treat or administer to, or care for or protect the deceased. It merely states in general terms, and tested by a motion to strike, it is our conclusion that it was not specific enough to give the defendant knowledge of what acts of negligence it was charged with.

There are three essential elements in actionable negligence; First, a duty imposed by law to exercise care in favor of the person for whose benefit the duty is imposed; second, the failure to perform that duty; and third, a consequent injury so connected with the failure to perform the duty that the failure is the proximate cause of the injury. Illinois Central R. R. Co. vs. Oswald, 338 Ill. 270.

It is not charged in the complaint that the negligence of the defendant was the cause of the death of the deceased, but that she was killed by a train. In the Illinois Central R. R. Co. vs. Oswald, supra, the Court stated what is meant by proximate cause and we there find the following: "What constitutes proximate cause has been defined in numerous

decisions, and there is practically no difference of opinion as to what the rule is. The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which might result from his act. If the negligence does nothing more than furnish a condition by which the injury is made possible and that condition causes an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury. (Hartnett v. Boston Store, 265 Ill. 331; Chicago Hair and Bristle Co. v. Mueller, 203 id. 558.) An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury and itself becomes the direct and immediate cause of the injury. (Pullman Palace Car Co. v. Laack, 143 Ill. 242; Seith v. Commonwealth Electric Co., 241 id. 252.) One act may furnish the occasion for another act, and such second act may be the cause of an injury without the first act in any manner being a contributing cause of such injury. The second act may be the result of some intervening cause in no manner flowing from the original act but which cause is given an opportunity to operate through the occasion furnished by such original act. The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act. Phillabaum v. Lake Erie and Western Railroad Co., 315 Ill. 131."

It is our conclusion that the acts of negligence charged in the complaint do nothing more than to furnish a condition by which the injury to the plaintiff was made possible, and it was the subsequent and independent act of the railroad company which caused her injury and death, and the defendant's negligence was not the proximate cause of the injury.

It is therefore our opinion that the trial court properly sustained the motion to strike the complaint, and entered judgment in favor of the defendant.

Judgment affirmed.

Mr. Justice Anderson took no part in the consideration or determination of this case.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

May Term, A. D. 1954.

General No. 9937 | Agenda No. 4

Vernard Stanton, Plaintiff-Appellee, vs. Theodore Shakofsky, Defendant-Appellant.	Appeal from the Circuit Court of Macoupin County.

REYNOLDS, P. J.

This is a suit for alleged balance due on the purchase price of hogs. Vernard Stanton sold Theodore Shakofsky 47 hogs in September 1950. At the time the hogs were delivered, they were inoculated by Dr. Green, a veterinarian. Some thirteen of the hogs died within a period of ten days. The hogs developed cholera a day or so after delivery and Dr. Green was called in and treated them. There is some dispute as to payment, the plaintiff claiming payment of $600.00 and the delivery of a palomino mare for a credit of $70.00 or a total of $670.00. The defendant claims payment of $610.00 and the delivery of the mare, or a total of $680.00. The purchase price of the hogs was $855.00.

The case was originally tried before a Justice of the Peace and judgment was given for the plaintiff for $175.00. The case was appealed to the Circuit Court of Macoupin County, and judgment of $175.00 in favor of the plaintiff was rendered. From that

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

May Term, A. D. 1954.

General No. 9937 Term No. 4

Vernard Stanton, Plaintiff-Appellee,	
vs.	
Theodore Sharofsky, Defendant-Appellant.	

REYNOLDS, P. J.

This is a suit for [illegible] price of hogs. Vernard [illegible] in September 1950. [illegible] they were inoculated [illegible] of the hogs [illegible] cholera [illegible] treated them. There is [illegible] claiming [illegible] for a credit of [illegible] payment of [illegible] of [illegible]. The purchase [illegible]

The case was originally [illegible] and judgment [illegible] was [illegible] of 1950 [illegible]

judgment, the cause is appealed to this court.

Two questions are before us on the appeal. 1. Was there a breach of an implied warranty? 2. Was there an accord and settlement? There seems to be little dispute about the facts. The question before this court as to the breach of the implied warranty, would seem to rest upon the duty of the seller to deliver animals that are free from disease. Here the animals were delivered to the buyer who had them inoculated at the time of delivery. They appeared to be healthy hogs. While it is urged that the defendant had an opportunity to inspect the hogs and found nothing wrong with them, yet the nature of the disease they were infected with, cholera, was such that the veterinarian called in, did not detect the presence of cholera. The doctrine of caveat emptor would not apply where it would take trained examination to discover the defect. The hogs developed the cholera within two or three days after delivery, and the veterinarian testified that the minimum incubation period for cholera was five days, so it is readily apparent that the hogs or some of them, were infected with cholera at the time of delivery.

Section 15, Chapter 121½, Illinois Revised Statutes (1951) provided as follows:

> (1) "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment,*** there is an implied warranty that the goods shall be reasonably fit for such purpose."

Here, Shakofsky was a farmer. He bought the hogs from Stanton under an implied warranty that they would be healthy and fit. While the evidence does not show the purpose for which the hogs were purchased, it does show that Shakofsky was a farmer and not a dealer in livestock. He had made several purchases of hogs from

judgment, the cause is appealed to this court.

Two questions are before us on the appeal. 1. Was there a breach of an implied warranty? 2. Was there an acceptance settlement? There seems to be little dispute about the facts. The question before this court as to the breach of the implied warranty, would seem to rest upon the duty of the seller to deliver cattle that are free from disease. [illegible] the buyer who had then incurred [illegible] appeared to be healthy [illegible] had an opportunity to inspect [illegible] them, yet the nature of the [illegible] was such that [illegible] or before. The doctrine of [illegible] would take [illegible] develop [illegible] the cattle within two or three [illegible] the veterinarian testified that the minimum incubation [illegible] cattle are five days, so it is readily apparent that the [illegible] of sale, were infected with cattle [illegible] delivery.

Section 15, Chap[illegible]

provided as follows:

> (1) [illegible]
> make known to [illegible]
> which [illegible]
> the buyer relies [illegible]
> there is [illegible]
> reasonable fit for [illegible]

Here, Chapter [illegible]

Under an implied [illegible]

While the [illegible]

were purchased [illegible]

a dealer in livestock [illegible]

Stanton before. Cholera infected hogs would not be reasonably fit for the purpose for which they were purchased by Shakofsky.

Section 15, Subsection (3) of Chapter 121½ Illinois Revised Statutes provides as follows:

> (3) "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

It is true that the buyer, Shakofsky, had a chance to examine the hogs. But the defect was such that his examination would not have revealed the presence of cholera. This is evident because the veterinarian failed to detect the cholera.

Section 69 of Chapter 121½ Illinois Revised Statutes provides as follows:

> (1) "Where there is a breach of warranty by the seller, the buyer may, at his election--
>
> (a) Accept or keep the goods, and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price."

Here, all but approximately $175.00 was paid and the buyer did set up by way of diminution of the price, the balance of $175.00. The case of Kennett, Sparks & Co. v. Knecht, 221 Ill. App. 601 is a case in point. There, hogs were bought for feeding, to be hogs that were vaccinated and would pass inspection. The hogs were delivered and proved to be diseased. The purchaser kept the hogs, and gave his check for them. There, as in this case, he had a chance to inspect the hogs and found nothing wrong with them. When it was discovered that the hogs were diseased, he stopped payment on his check. The court held it was a breach of warranty and that the

defendant was entitled to recoup for the breach.

We think there was a clear breach of warranty on the part of the seller Stanton, and that the buyer, Shakofsky, was entitled to diminution of the purchase price in the amount of $175.00.

This makes it unnecessary to pass upon the question of accord and settlement.

Reversed.

defendant was entitled to recoup for the breach.

We think there was a clear breach of warranty on the part of the seller Stanton, and that the buyer, Blanchfaky, was entitled to diminution of the purchase price in the amount of $[illegible].

This makes it unnecessary to pass upon the [illegible] record and settlement.

[illegible].

4063

A

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

2 I.A.2d 528

May Term, A. D. 1954.

General No. 9942.

Agenda No. 1.

People of the State of Illinois,

Plaintiff-Defendant in Error,

Vs.

Edward Ford,

Defendant-Plaintiff in Error.

Error to
County Court of
Sangamon County.

REYNOLDS, P. J.

This cause comes to this court on a writ of error to the County Court of Sangemon County. Edward Ford, the defendant was found guilty, by a jury, of an assault with a deadly weapon upon one Thomas McDaniel, with intent to inflict bodily injury without provocation and under circumstances showing a malignant heart. Upon the jury's verdict of guilty, the Court denied a new trial, denied probation, entered judgment on the verdict and sentenced the defendant, Ford, to imprisonment for one year and fined him five hundred dollars and costs. From that judgment the defendant, Ford, brings a writ of error to this court.

The evidence seems to agree that McDaniel, the prosecuting witness, went into the restaurant of the defendant Ford and ordered a chicken sandwich. Upon being served with this sandwich he complained that it was tainted, whereupon the waitress refunded his

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

May Term, A. D. [illegible]

General No. 9242.

People of the State of Illinois,

Plaintiff-Appellee, [illegible]

vs.

Edward [illegible],

Defendant-[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] under circumstances showing a willingness [illegible]

[illegible] verdict of guilty, [illegible]

[illegible], entered [illegible]

[illegible] -ord, to [illegible]

[illegible] dollars [illegible]

[illegible] a term of [illegible]

The evi[illegible]

[illegible]nces, we[illegible]

[illegible] chicken [illegible]

plained

money. Ford was notified and he tasted the sandwich and decided it was not tainted. He called to McDaniel and told him that the sandwich was not tainted and that evidently McDaniel's taste was bad. From that point on, the evidence is conflicting. McDaniel claimed that Ford was angry and struck the first blow; that they struck at each other and that Ford then came out with the gun and shot him. McDaniel is the only witness for the prosecution on this point, and his testimony is wholly uncorroborated as to what happened. Five witnesses testified for the defense and these five witnesses testified that McDaniel became enraged, rushed to where Ford was standing and struck the first blow; that he had Ford down and was battering him with his fists and knees; that the fight had progressed into a passageway used as an office by Ford, which was adjacent to the restaurant but not part of the main room of the restaurant; that while down, Ford reached and got his pistol from someplace in the office and shot McDaniel. There is some testimony that Mrs. Ford, the wife of the defendant called to her husband not to shoot, but this is denied by other witnesses. McDaniel suffered a shattered bone in the left leg and a flesh wound in the right leg. Ford claimed to have been bruised and hurt, but received no injuries that required hospitalization and was not scarred. After being wounded McDaniel crawled to the door, where a police ambulance picked him up and delivered him to the hospital. Ford, in the meantime, had made no effort to assist the wounded man, but had called police and upon their arrival surrendered the pistol.

The defendant urges the following points: 1. That an

money. Ford was notified and he tasted the sandwich and decided it was not tainted. He called to McDaniel and told him that the sandwich was not tainted and that evidently Clarkin's taste was bad. From that point on, the evidence is conflicting. McDaniel claimed that Ford was angry and struck the first blow; that they struck at each other and that Ford then came out with the gun and shot him. McDaniel is the only witness for the prosecution on this point, and his testimony is wholly uncorroborated. [illegible] witnesses testified for the defense [illegible] witnesses testified that McDaniel [illegible] striking and struck the first blow; that [illegible] and was pressing him with his fists [illegible] a passageway [illegible] pressure but not [illegible] while down, [illegible] and got his pistol from [illegible] office and [illegible] Ford. There is some testimony that [illegible] the wife of the defendant called to [illegible] not to shoot, [illegible] is denied by other [illegible] in the left leg [illegible] to the open bra[illegible] placed hospital [illegible] McDaniel [illegible] up and de[illegible] made no [illegible] upon their [illegible]

The defendant [illegible]

examination of the record shows beyond question that the defendant acted in necessary self defense; 2. That where the evidence is insufficient to remove all reasonable doubt of the defendant's guilt, the trial court must reverse, despite a contrary finding by the jury; 3. That upon motion for directed verdict at close of People's case, and upon motion for new trial, the court may review all the evidence to determine whether the defendant is proven guilty beyond all reasonable doubt; 4. That where the State's Attorney makes inflammatory and unfair remarks to the jury in his closing argument, and the verdict of the jury is palpably the result of bias, passion or prejudice, the conviction should be reversed; 5. That instruction No. 16 was erroneous, since in its form it directed a verdict, while omitting the element of reasonable doubt from the instruction.

For the purpose of this opinion, the first three points can be considered as one and passed upon accordingly. In this case, one witness testified that the defendant was the aggressor, and five witnesses disputed this and testified that the prosecuting witness was the aggressor. It is true that in giving weight to the testimony of witnesses the number of witnesses on one side or the other is not conclusive. A number of factors enter into the weight to be given to the testimony. The candor or lack of candor, the appearance on the stand, the bias, or lack of bias of the witnesses, the circumstances surrounding the occurrence and many other things make up the yardstick for measuring the weight of testimony.

Questions as to the credibility of witnesses and the weight of the evidence are for the jury. People v. Filas, 369 Ill. 78; People v.

examination of the record shows beyond question that the defendant acted in necessary self defense; 2. That where the evidence is insufficient to remove all reasonable doubt of the defendant's guilt, the trial court must reverse, despite a contrary finding by the jury; 3. That upon motion for directed verdict at close of People's case, and upon motion for new trial, the court may review all the evidence to determine the defendant's guilt beyond all reasonable doubt; 4. That [illegible] Attorney makes inflammatory and improper remarks to the jury [illegible] objection requests, and the verdict of the jury [illegible] of fact, passion or prejudice, the [illegible] should [illegible] tion No. 10 [illegible] verdict, while omitting [illegible] reasonable [illegible] or [illegible]

[illegible] can be considered [illegible] witness [illegible] five witnesses [illegible] [illegible] testimony [illegible] [illegible] be given to [illegible] appearance [illegible] make up [illegible]

[illegible] the witness are [illegible]

Kerbeck, 362 Ill. 251; People v. Fortino, 356 Ill. 415; People v. Bloom, 370 Ill. 144. This court has said many times that where questions of fact were involved, the verdict of the jury and the decisions of the trial court, who saw and observed the witnesses and had an opportunity to weigh the evidence thus presented, would not be disturbed by this court, unless palpably erroneous. However, this court has a duty, if, after careful consideration of the evidence, giving due consideration to the fact that the court and jury saw and heard the witnesses, the reviewing court regards the evidence in the record by reason of improbability, unreasonableness or unsatisfactory character, insufficient to remove all reasonable doubt as to the guilt of the defendant, to reverse the judgment. People v. Nemes, 347 Ill. 268. In the case of People v. Scott, 407 Ill. 301, at page 304, the court there said: "It is the further duty of a reviewing court, where a verdict is returned by a jury in a criminal case or where a similar finding is made by a court where a jury has been waived, not only to carefully consider the evidence but to reverse the judgment if the evidence is not sufficient to remove all reasonable doubt of the defendant's guilt and is not sufficient to create an abiding conviction that he is guilty of the crime charged. (People v. Abbate, 349 Ill. 147.)" People v. Mosher, 403 Ill. 112. In the case of People v. Willson, 401 Ill. 68, the court there said: "***It is well settled that this court may review all the evidence to determine whether it shows the guilt of the defendant beyond a reasonable doubt, and where the record leaves this court with a grave and substantial doubt of the guilt of the defendant we will reverse the judgment. (People v. Bradley, 375 Ill.

Kerbeck, 362 Ill. 251; People v. Fortino, 356 Ill. 415; People v. Bloom, 370 Ill. 144. This court has said many times that where questions of fact were involved, the verdict of the jury and the decisions of the trial court, who saw and observed the witnesses and had an opportunity to weigh the evidence as thus presented, would not be disturbed by this court, unless [illegible]. However, this court has a duty, in [illegible] of the evidence, giving the [illegible] and jury [illegible] the evidence [illegible] abiness or [illegible] reasonable doubt [illegible] judgment. [illegible] doubt. [illegible] trial jury of [illegible] a jury [illegible] court [illegible] the [illegible] fictions to [illegible] is not [illegible] of the [illegible] People, 403 Ill. [illegible] [illegible] the defendant [illegible] this court [illegible] defendant [illegible]

182; People v. Logan, 358 Ill. 64; People v. Shack, 396 Ill. 285."
Following these authorities it is not only the right but the duty of a reviewing court to carefully consider all the evidence and if after such review there is a grave and substantial doubt as to the guilt of the defendant, to reverse the judgment.

In this case we have carefully considered all the evidence. It seems improbable to this court that the prosecuting witness, McDaniel, was not in fact the aggressor. He had complained of the food and had been refunded his money. The proprietor, Ford, then accosted him and told him his taste was bad, or words to that effect. Apparently McDaniel resented this statement and the argument started. McDaniel testified that Ford then struck at him. Three or four witnesses contradict this and claim that McDaniel struck the first blow. McDaniel testified that he was shot in the restaurant. Three or four witnesses testified that he was shot in the passageway where the office was located. In other words, if this conviction can be sustained it must be sustained on the uncorroborated testimony of the injured man, McDaniel. While his testimony is positive, the contradicting testimony is equally positive. While reluctant to reverse the finding of the jury in this case, we are equally reluctant to affirm a judgment that will take the defendant's liberty for a period of one year, upon the uncorroborated testimony of one of the parties who is certainly an interested party, and disregard the testimony of other witnesses, some interested and some not interested, who contradict the essential facts necessary to sustain a conviction. This is a criminal case and the defendant must be proven guilty as charged in the information beyond a reasonable

182; People v. Logan, 358 Ill. 64; People v. Shack, 396 Ill. 285." Following these authorities it is not only the right but the duty of a reviewing court to carefully consider all the evidence and if after such review there is a grave and substantial doubt as to the guilt of the defendant, to reverse the judgment.

In this case we have carefully considered all the evidence. It seems improbable to this court that the [illegible] witness, McDaniel, was not in fact the [illegible]. He had [illegible] food and had been [illegible] accosted him and [illegible]. Apparently [illegible]. McDaniel testified that [illegible] which case [illegible] [illegible] conviction. [illegible] proven guilty [illegible]

doubt. A careful consideration of all the testimony leaves this court with a grave doubt that the defendant has been proven guilty as charged beyond a reasonable doubt. Having such a grave doubt, the judgment will be reversed.

Because this court feels impelled to reverse the judgment on the ground that the evidence is unsatisfactory, it will not be necessary to pass upon the remaining two points of error assigned.

Reversed.

doubt. A careful consideration of all the testimony leaves this court with a grave doubt that the defendant has been proven guilty as charged beyond a reasonable doubt. Having such a grave doubt, the judgment will be reversed.

Because this court finds himself to rev[illegible] the judgment on the ground that the evidence is weak, [illegible] it will not be necessary to pass upon the remaining two points [illegible] and [illegible].

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

May Term, A. D. 1954

12 I.A.2d 528

General No. 9948

Agenda No. 12

Bloomington Township, a Municipality, Plaintiff-Appellant, vs. Brad F. Grinter, Defendant-Appellee.	)	Appeal from the Circuit Court of McLean County

CARROLL, J.

The defendant, Brad Grinter, was found guilty by a Justice of the Peace of operating a second hand automobile business in violation of an Ordinance of Bloomington Township, in McLean County, and was ordered to pay a fine as provided in the said Ordinance. The defendant appealed to the Circuit Court, where upon a hearing he was adjudged not guilty. From the decision of the Circuit Court plaintiff prosecutes this appeal.

The facts involved in this litigation are not in dispute. The Ordinance under which defendant was prosecuted was enacted by the electors of Bloomington Township at an annual Town Meeting, pursuant to Section 39.12, Chapter 139, Illinois Revised Statutes, 1953, and provides for the regulation and licensing of dealers in junk, rags and second hand articles, including automobiles. Pertinent to the questions raised on this appeal are the provisions of the Ordinance

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

May Term, A. D. 1958

12 I.A.220

General No. 9948 Agenda No. 12

Bloomington Township, a Municipality,

Plaintiff-Appellant,

vs.

Fred Grinder,

Defendant-Appellee.

Appeal from the Circuit Court of McLean County

ARNOLD, J.

The Defendant, Fred Grinder, was convicted by a Jury of the Peace of operating a motor vehicle in violation of an Ordinance of Bloomington Township, in McLean County, and was ordered to pay a fine as provided in the ordinance. The defendant appealed to the Circuit Court, where upon a trial he was adjudged not guilty. From this order [illegible] plaintiff prosecutes this appeal.

The facts [illegible] are in dispute.

The Ordinance under which defendant was prosecuted by the electors of Bloomington Township [illegible], amendment to Section 70.12, Ch. [illegible], Par. [illegible], and provides for the regulation of [illegible] and second hand [illegible]. [illegible] motions raised on behalf of the [illegible]

which provide that licenses thereunder "shall be issued by the electors at town meeting assembled, and by no other persons"; that applications for licenses shall be made by filing a plat with the Town Clerk showing the location and boundaries of the proposed place of business 30 days prior to the annual Town Meeting; and that "At the annual town meeting in each year such application shall be presented by the Clerk and acted upon by the electors. If the application is approved by a majority of the electors present, then a license shall issue to such dealer in accordance with the terms hereinbefore set out. If the application be not approved by a majority of the said electors then no license shall issue."

The record shows that on March 3, 1953 the defendant made application for a license to engage in the business of dealing in second hand automobiles; that his application in writing was made to the Supervisor, Clerk and electors of Bloomington Township in accordance with the requirements of the Ordinance; that at the 1953 annual Town Meeting the electors of said Bloomington Township refused to grant a license to defendant; that the defendant commenced operation as a second hand automobile dealer without a license, with the result that this action was instituted against him by plaintiff.

The Ordinance does not designate an enforcing officer, nor does it prescribe any rules or specifications with which an applicant must comply in order to qualify for a license. By the order appealed from the Circuit Court found the Ordinance to be invalid and that the enforcement of same would deprive the defendant of his property without due process of law; that the provisions of said Ordinance relative to mak-

which provide that licenses thereunder "shall be issued by the electors
at town meeting assembled, and by no other persons"; that applications
for licenses shall be made by filing a plat with the Town Clerk show-
ing the location and boundaries of the proposed place of [illegible] 30
days prior to the annual Town Meeting; and that [illegible] annual town
meeting in each year such application shall be [illegible] Board
and acted upon by the electors. [illegible]
majority of the electors [illegible]
dealer in accordance with [illegible]
ation be not necessary [illegible]
license shall issue.

The record [illegible]
application for [illegible]
second hand automobiles [illegible]
the Supervisor, that [illegible]
with the requirements [illegible]
setting the [illegible]
license to sell [illegible]
second hand [illegible]
has notic[illegible]

[illegible]

[illegible] is it necessary [illegible]
comply in order [illegible]
the Circuit Court [illegible]
[illegible]t of [illegible]
[illegible]rtung of [illegible]

ing application therefor to be acted upon at an annual Town Meeting are unreasonable, and that certain other provisions of said Ordinance are unreasonable.

The defendant raises the point that since a Constitutional question is involved in this case the Appellate Court is without jurisdiction to determine the same, and that the appeal should have been taken direct to the Supreme Court.

In numerous cases it has been held that where the trial Judge did not certify that the public interest required a direct appeal to the Supreme Court, the Appellate Court could decide the question of the validity of an Ordinance. In the instant case a decision as to validity of the Ordinance in question does not involve a construction of the Constitution. City of Greenville v. Nolan, 279 Ill. App. 311; Raymond v. Village of River Forest, 350 Ill. App. 80. The above decisions would appear to be conclusive on the point argued by the defendant and this Court has jurisdiction to pass upon the validity of the Ordinance in question.

The question for decision on this appeal is whether an Ordinance which vests an arbitrary discretion in the electors of a township to grant or refuse a license to engage in the business of dealing in second hand automobiles represents a reasonable exercise of police power.

It is to be observed that the Ordinance with which we are concerned in this case contains no rule or standard by which those who pass upon an application for a license may be guided in reaching a decision as to whether such application should be granted or denied. The generally accepted rule is that an Ordinance vesting such arbitrary discretion with reference to the licensing of an ordinarily lawful

ng application therefor to be acted upon at an annual Town Meeting re unreasonable, and that certain other provisions of said ordinance re unreasonable.

The defendant raises the point that since a constitutional question is involved in this case the Appellate [illegible] juris-diction to determine the case, and [illegible] taken direct to the Supreme Court.

In numerous cases in [illegible] udge did not certify [illegible] o the Supreme Court, [illegible] f the validity of an ordinance [illegible] o validity of the ordinance [illegible] ion of the foregoing [illegible] ll; *Harmond* v. [illegible] ecisions would [illegible] ertaining [illegible] he validity [illegible]

[illegible]

business in public officials, and which in effect authorizes the issuing or withholding of a license as such officials may arbitrarily choose, is void as being unreasonable. 38 Am. Jur. Municipal Corporations, Sec. 337. In the instant case an arbitrary discretion to grant or refuse a license to an applicant thereunder is vested in the electors of the township at an annual Town Meeting. There would seem to be no distinction which can be made between the vesting of such arbitrary discretion in public officials or in private persons. In City of Evanston v. Wazau, 364 Ill. 198 the Supreme Court said: "Laws or Ordinances by which the rights of a citizen have been subjected to the unlimited discretion of an officer, without any rule or provision of law to govern or control his action, are uniformly held unconstitutional." In Cicero Lumber Co. v. Town of Cicero, et al, 176 Ill. 9, the Court was concerned with an Ordinance which forbid the use of heavy vehicles on a pleasure driveway except "upon special permission" of the Board of Trustees, without prescribing any general conditions upon which such permission should be granted. The Court held such an Ordinance to be unreasonable and invalid, and in its opinion had this to say:

> "The ordinance in no way regulates or controls the discretion vested thereby in the board. It prescribes no conditions, upon which the special permission of the board is to be granted. Thus, the board is clothed with the right to grant the privilege to some, and to deny it to others. Ordinances, which thus invest a city council or a board of trustees with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, are unreasonable and invalid. The ordinance should have established a rule by which its impartial enforcement could be secured."

The Ordinance involved in the instant case fails to set a standard or prescribe a rule to govern in cases coming within the operation of the Ordinance, but leaves its application to the ungoverned

discretion or whim of the electors at the annual Town Meeting. The authority of the electors of the town to enact an Ordinance pursuant to the power conferred by statute is not here involved, nor are we concerned with the validity of such statute. The Ordinance must be held to be unreasonable and therefore invalid because of its failure to specify the rules and conditions with which the citizens of the town of Bloomington might comply, and thus be enabled to exercise the privilege of engaging in the business licensed by the Ordinance. The business of dealing in used or second hand automobiles is not one that may be prohibited in itself. The People v. Busse, 240 Ill. 338. Under the Ordinance in question the business of engaging in the sale of second hand automobiles could be prohibited if the electors at a Town Meeting decided to refuse any license sought for the operation of such business. It is obvious that an Ordinance vesting such arbitrary discretion in the electors of a township renders such Ordinance unreasonable and invalid.

For the reasons herein indicated, we are of the opinion that the Order of theCircuit Court of McLean County adjudging the defendant not guilty and holding the Ordinance involved to be invalid was correct and should be affirmed.

Affirmed.

discretion or whim of the electors at the annual Town Meeting. The authority of the electors of the town to enact an Ordinance pursuant to the power conferred by statute is not here involved, nor are we concerned with the validity of such statute. The [illegible] to be unreasonable and therefore [illegible] specify the rules and conditions [illegible] of Bloomington might enact [illegible] of engaging in the business [illegible] of dealing in [illegible] be prohibited in toto. [illegible] the Ordinance in question [illegible] second has unreasonable [illegible] dealing does [illegible] business. It is [illegible] question in the [illegible] in itself.

[illegible]

In Order [illegible] not guilty [illegible] and should be [illegible].

4083 A

Abstract

STATE OF ILLINOIS | 2 I.A.2d 529

APPELLATE COURT

THIRD DISTRICT

MAY TERM, A.D. 1954

General No. 9941

Agenda No. 8

John C. Matthew,	)	
Plaintiff-Appellee,	)	Appeal from
vs.	)	Circuit Court of
	)	Christian County
Leon Croene,	)	
Defendant-Appellant.	)	

Hibbs, J.

This suit was brought in the Circuit Court of Christian County, to recover damages claimed on an alleged breach of warranty arising out of the sale of breeding cows. The cause was tried before the court who entered a judgment for the plaintiff. Defendant has appealed to this court.

Defendant, Leon Croene, advertised for sale in the Taylorville Breeze-Courier "22 head of bred Angus cows . . .". Shortly thereafter two friends of the plaintiff, John C. Matthew, examined the cattle and told the latter about the advertisement. Subsequently, and before visiting the Croene farm, Matthew read the advertisement. On March 30, 1951 he went to the Croene farm. While there he selected seventeen head at $290 per head and asked Croene to have

Reversed

them tested for Bangs disease. At that time he paid Croene $1000. A subsequent Bangs test indicated that five of the cattle so selected either had or were suspected of having the disease. The remaining twelve head were then delivered to plaintiff's farm and the balance of the purchase price paid Croene.

Matthew claims that the price he paid Croene was based on the going price for bred breeding stock; that at the time of the sale Croene warranted that the Angus cows had been bred to his Angus bull and that they would calve in about three months but only one cow subsequently bore a calf and that was a Hereford one. Plaintiff claimed, as damages, the difference between the price paid and the price of unbred cattle on the market. The trial court accepted this measure and fixed Matthew's damages at $852.50.

It is clear that Croene advertised the cattle as "bred Angus cows". Further, he testified at the trial: "I told him (Matthew) they were bred to the bull I bought with them. That is one bull I showed him." He, therefore, cannot now deny that he affirmed that the cows selected by Matthew had been bred and that this affirmation was made at the time of sale. While he also testified he told Matthew that he had not seen the cattle bred and was relying on the word of the person from whom he bought them, he did not qualify his earlier statement or indicate that there was any doubt that the cattle were bred.

Paragraph 12 of the Uniform Sales Act (Ill. Rev. Stat. 1951, ch. 121½, par. 12) states: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the

them tested for Bangs disease. At that time he paid Greene $1000. A subsequent Bangs test indicated that five of the cattle so selected either had or were suspected of having the disease. The remaining twelve head were then delivered to plaintiff [illegible] the balance of the purchase price paid Greene.

[illegible] Matthew claims that the price he paid Greene [illegible] on the going price for herd breeding stock; [illegible] Greene warranted that the herd was free [illegible] and that they would give [illegible] subsequently bore [illegible] claimed, as damages, [illegible] price of mixed cattle in the herd. [illegible] reasons and filed [illegible].

[illegible] Greene [illegible] cows". Further, [illegible] they were [illegible] showed him." He, [illegible] the cows selected [illegible] was made at the time of [illegible] them that he had [illegible] word of the [illegible] earlier statements [illegible] the were bred.

[illegible] ch. 121g, par. 12) [illegible] by the seller relating to the good [illegible]

natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." This section was construed in Beckett v. F. W. Woolworth Co., 376 Ill. 470, 34 N.E. (2d) 427 where it was said: "It is established that no particular words or forms of expression are necessary to create an express warranty. A positive assertion of a matter of fact made by a seller at the time of the sale, for the purpose of assuring the buyer of the fact and inducing him to make the purchase, if relied on by the purchaser, constitutes a warranty." We believe that the trial court properly found that Croene's statement described above, following his offer in the newspaper, constituted an express warranty. (Keller v. Flynn, 346 Ill. App. 499, 105 N.E. (2d) 532; Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118, 28 A.L.R. 986.)

Croene contends that even if his statements be construed to be representations of a material fact, Matthew did not and should not have relied upon them because he had ample opportunity to examine the cattle. Matthew visited Croene's farm in response to an advertisement describing bred cattle; he negotiated with and purchased from Croene the cows at a price far above the value of unbred cattle on the market. We believe the trial court correctly inferred and concluded that there was a reliance upon Croene's statements. In corroboration of this it appears from the record that in the latter part of April of the same year plaintiff complained to the defendant that he did not believe the cows had been bred. Later in August he made a demand on Croene for reimbursement for the damages he had

natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." This section was construed in Bockenek v. R. W. Woolworth Co., 276 Ill. App. 24, 26 (1934) where it was said: "It is established that no particular [illegible] or [illegible] representation are necessary to create an express warranty. [illegible] of a matter of fact made by a vendor [illegible] the purpose of assuring the buyer [illegible] make the purchase, it [illegible] warranty." We believe [illegible] Greene's statement [illegible] newspaper, constituted [illegible] Ill. App. 4d 1, 124 [illegible] Co., 166 Ohio St. [illegible]).

Greene contends that [illegible] be representations [illegible] not have relied upon [illegible] the cattle. [illegible] ment describing bred [illegible] Greene the cows [illegible] the market. [illegible] guaranteed [illegible] correct [illegible] part of [illegible] that he did not [illegible] made a demand on [illegible]

suffered thereby.

We also believe Matthew was warranted in such reliance. Whether the cows were bred could not be definitely determined at that time from observation. Such fact was peculiarly within Croene's knowledge, if anyone had knowledge of it. Whether he was misinformed is of no importance; he should not have affirmed facts of which he was not certain. The peril of mistake was his. (Hicks v. Stevens, 121 Ill. 186; Keller v. Flynn, supra.)

Paragraph 69 (1b) of the Uniform Sales Act provides that where there is a breach of warranty, a buyer may "accept or keep the goods and maintain an action against the seller for damages". In Paragraph 69 (7) the measure of these damages is fixed at "the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty". The weight of the cattle involved here was estimated at the trial at 750 to 1000 pounds each. The market price of unbred cattle was described as from 25¢ to 27¢ per pound; the value of bred Angus cattle was fixed by Croene at from $200 to $500 per head. The damages of $852.50 fixed by the trial court were well within the range of the evidence and were determined in the statutory manner.

The judgment of the Circuit Court of Christian County is affirmed.

Judgment affirmed.

Filed 5-20-54

suffered thereby.

We also believe Mathews was warranted in some [illegible] alleges. Whether the cows were dead could not be definitely determined at that time from observation. Some [illegible] from his knowledge, if anyone had [illegible] of it. [illegible] is of no importance; [illegible] was not certain. The [illegible] 121 III. 186; [illegible] v. [illegible].)

Paragraph [illegible] there is a breach of warranty, [illegible] and maintain an action [illegible] Graph 69 (7) [illegible] between the [illegible] and the value [illegible] ranty". [illegible] the total at [illegible] cattle was [illegible] damage of [illegible] range of [illegible]

The judgment [illegible] affirmed.

Abstract

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STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

MAY TERM, A.D. 1954

12 I.A. 529

General No. 9946

Agenda No. 2

People of the State of Illinois,	)	
Plaintiff-Defendant in Error,	)	Error to County Court of Hancock County
vs.	)	
Levi Long,	)	
Defendant-Plaintiff in Error.	)	

Hibbs, J.

On July 12, 1952 plaintiff in error, Levi Long, was arrested for driving an automobile while under the influence of intoxicating liquor. On July 22, 1952 an information was filed in the County Court of Hancock County charging the plaintiff in error with this statutory violation and further charging that on April 14, 1951 he was convicted in the same county of the same offense. After a trial before a jury and a verdict of guilty he was sentenced by the judge to six months imprisonment at the Illinois State Farm at Vandalia and fined the sum of $100.

Long sued out a writ of error in the Supreme Court, alleging among other errors, a violation of his constitutional rights, but the cause was transferred here because no debatable constitutional

Abstract

STATE OF ILLINOIS

APPELLATE COURT

FIFTH DISTRICT

MAY TERM, A.D. 1959

General No. 9946

Agenda No. 2

People of the State of Illinois,

Plaintiff-Defendant in Error,

vs.

Levi Long,

Defendant-Plaintiff in Error.

Error to Circuit Court of Jackson County

Hobbs, J.

On July 1[illegible], 1[illegible], [illegible] was arrested for driving an automobile while under the influence of intoxicating liquor. On July 2[illegible], 1[illegible] [illegible] County Court of Jackson County [illegible] statutory violation and [illegible] was convicted in the [illegible] County Court [illegible] before a jury and a verdict of guilty [illegible] to six months imprisonment [illegible] and fined the sum of $[illegible].

Long filed [illegible] among other errors, [illegible] the cause was circumstantial [illegible]

question was presented. (People v. Long, 415 Ill. 599.)

It appears that appellant, a resident of Carthage, Illinois, drove his 1937 Pontiac to Keokuk, Iowa on July 12 about four P.M. In the early evening he began the return trip to Carthage, stopped at a tavern at Hamilton, a distance of two and one-half miles from Keokuk. About 9:40 o'clock the same evening he resumed his trip home but stopped in a garage driveway in Elvaston, six miles east of Hamilton, where he was arrested.

Two deputy sheriffs of Hancock County, driving an auto, came upon a 1937 or 1938 Pontiac about one and one-half miles west of Elvaston between 10:00 and 10:30 P.M. With the headlights of their car on dim and maintaining an equal speed with the Pontiac they followed it into Elvaston where it turned in at a garage. During that one and one-half miles the deputies observed that the car ahead of them proceeded at a speed which was irregular and varied from thirty to sixty miles an hour, went over the black line and off the paved portion of the highway and lost its muffler. One of the deputies observed that the license number of the car was 886740 and took the number down. Defendant did not deny that this was his license number. When the deputies arrived, the defendant was just getting out of his car. He held onto it and repeated many times, "She's got a miss in her." Both arresting officers testified that Long had a smell of liquor on his breath, was unsteady and wobbly on his feet, that his eyes were bloodshot and was very talkative. Loretta B. Hartrick, the Justice of the Peace before whom the plaintiff in error

was taken when arrested, testified, that he admitted he had been drinking, begged to be taken home and not charged with drunken driving, was talkative, staggered in his walk, his eyes were bloodshot and his breath smelled of liquor.

The plaintiff in error testified that earlier in the day he consumed two bottles of beer, while at Keokuk ate a sandwich, and later drank another bottle of beer, and on his return trip to Carthage stopped at a tavern in Hamilton where he rested because he was ill. He resumed his trip, and on the way to Elvaston, was followed by a car with bright lights which reflected in his rear mirror, speeded up to outdistance the car, and failing that slowed down, hoping that the car would pass. He further said that he drove into the garage driveway at Elvaston to check a spark plug and to escape the lights, that he had raised the hood and fixed the spark plug before the officers arrived. He denied that his muffler dropped off, and there is evidence that some days after the accident his car had a muffler on it.

Appellant filed a written motion to quash the information, alleging among other things, that he was arrested without a warrant on July 12, 1952, taken before a Justice of the Peace on the same day where a complaint was reduced to writing and filed with the Justice; that on July 14 he was admitted to bail and the cause was continued until July 22; that while said proceedings were pending before the Justice, no hearing having been had on the complaint, the State's Attorney filed the information here involved in the

was taken when arrested, testified, that he admitted he had been drinking, begged to be taken home and not charged with drunken driving, was talkative, staggered in his walk, his eyes were bloodshot and his breath smelled of liquor.

The plaintiff in error was then and there in [illegible] consumed two bottles of beer, [illegible] later drank another bottle of beer, [illegible] to Gurnee where stopped at a tavern [illegible] was ill. He removed his hat, [illegible] a fellow by a car [illegible] proceeded up to [illegible] hoping that [illegible] the garage [illegible] the lights, [illegible] before the [illegible] car, [illegible] car [illegible]

[illegible] allegations [illegible] on duty [illegible] day [illegible] during [illegible] court [illegible] before [illegible] the Deede's [illegible]

County Court and then dismissed the complaint before the Justice. He thereby claims that his rights under the Statute were thereby prejudiced. Where an information is filed in the County Court charging a misdemeanor which has as a part of its punishment a possible jail sentence, a Justice of the Peace before whom a complaint has been filed previously on the same state of facts loses all jurisdiction to proceed. (People v. Montgares, 347 Ill. 562 at P. 569; People v. Johnson, 411 Ill. 248 at P. 250; Wood v. Olson, 117 Ill. App. 128 at Pgs. 134 and 136.) There was no error in overruling the motion to quash for the above reason.

There is a conflict in the evidence but we cannot say that there is a reasonable doubt as to the guilt of the accused or that we should substitute our judgment for that of the jury. (People v. Arnett, 408 Ill. 164; 96 N.E. (2d) 535.)

It is pointed out that the Motor Vehicle Act provides for an increased minimum penalty for second and subsequent convictions of driving a car while intoxicated but does not indicate how prior convictions should be brought to the attention of the court and jury. (Ill. Rev. Stat. 1951, Ch. 95½ Par. 144.) The prosecuting officer in the cause followed the procedure expressly indicated under the Habitual Criminal Act, alleged a prior offense and made proof thereof at the trial by the records of the County Court. (Ill. Rev. Stat. 1951, Ch. 38 Par. 602-3.) While we are aware of the hazards inherent in permitting evidence of prior convictions for the same offense to be introduced at the trial of a subsequent one, as was

County Court and then dismissed his complaint before the Justice. He thereby claims that his rights under the [illegible] were thereby prejudiced. Where an information is filed in the County Court charging a misdemeanor which was a [illegible] of the preliminary a possible jail sentence, [illegible] has been filed previously [illegible] jurisdiction to proceed. [illegible] People v. Johnson, [illegible] App. 128 [illegible] 1[illegible] the right to [illegible]

There is a conflict [illegible] where is [illegible] we should reverse [illegible] Arnold, [illegible]

In [illegible] interest [illegible] gravity [illegible] constitution [illegible] jury. [illegible] office in [illegible] the right [illegible] trial [illegible] Stat. 1-21, [illegible] jurisdiction [illegible] offense [illegible]

pointed out in People v. Lund, 382 Ill. 213, 46 N.E. (2d) 929, this procedure has been permitted under the Habitual Criminal Act and the doctrine of the Lund case where limiting instructions to the jury are used. (People v. Lawrence, 390 Ill. 499; 61 N.E. (2) 361.) We do not believe the defendant was prejudiced by the method employed in this case. The procedure adopted was fair and just and in the absence of express statutory directions it was a proper means of achieving the result anticipated by the Statute.

The plaintiff in error complains that the County Court erred in refusing his instruction No. 16 which limited the jury in its consideration of the evidence of a prior conviction. The subject matter of this instruction was adequately covered in defendant's given instructions numbered 4 and 17. Nor is instruction No. 17 given on behalf of the People subject to criticism. It stated that certain of the People's exhibits were admitted "only for the purpose of showing the prior conviction" of the defendant. It cannot reasonably be said that this indicated to the jury such exhibits did prove the conviction. In any event, the questions of fact to be determined by the jury were adequately presented by defendant's instruction 17 and other instructions given by the Court. People's instruction No. 16, to the giving of which complaint is made, was approved in People v. Wallage, 353 Ill. 95; 186 N.E. 540. Defendant's tendered instruction No. 15 was properly refused because it attempted to define the term "reasonable doubt". (People v. Flynn, 378 Ill. 351; 38 N.E. (2d) 49.)

Only two instructions as to the form of the verdict were

pointed out in People v. Lund, [illegible], this
procedure has been permitted under [illegible]
the doctrine of the Lund case where [illegible]
are used. (People v. [illegible]) We
do not believe the [illegible]
in this case. [illegible]
absence of express [illegible]
achieving the result [illegible]

The plaintiff [illegible]
in [illegible]
consider [illegible]
nature of [illegible]
given [illegible]
give [illegible]
denial of [illegible]
of [illegible]
[illegible]

tendered, one on behalf of the People and one on behalf of the plaintiff in error. People's instruction No. 27 stated in substance that if the jury find from the evidence beyond a reasonable doubt the defendant was guilty of driving a motor vehicle while under the influence of liquor and if they also find beyond a reasonable doubt that he had previously been convicted of the same offense, then the form of their verdict should be: "We the jury find the defendant, Levi Long, guilty of driving a motor vehicle while under the influence of intoxicating liquor, and we further find that said defendant had previously been convicted of driving a motor vehicle while under the influence of intoxicating liquor in the County Court of Hancock County, Illinois, all in manner and form as charged in the information."

Plaintiff in error's instruction No. 20 advised the jury that if the evidence leaves in your mind a reasonable doubt of the guilt of Levi Long, then the form of your verdict shall be: "We the jury find the defendant, Levi Long, not guilty."

It is contended that the forms of verdict did not give the jury the opportunity to find the defendant guilty of the offense alleged to have been committed on July 12, 1952 but not guilty of the prior one. The evidence here supported the charge under which the form of verdict on behalf of the People was given. The plaintiff in error made no objection to the form of the verdict and did not request any other form except the one to find the defendant not guilty. He is therefore in no position to claim that error was comitted. (People v. Horan, 360 Ill. 269.)In Bowman v. State (Ind.) 192 N.E. 755, it

tendered, one on behalf of the people and one on behalf of the plaintiff in error. People's instruction No. 27 [illegible] in substance that if the jury find from the evidence beyond a reasonable doubt the defendant was guilty of driving [illegible] motor vehicle while under the influence of liquor and if they [illegible] reasonable doubt that he had previously been convicted [illegible], then the form of their verdict should [illegible] Levi Long, guilty of driving [illegible] while under the influence of intoxicating liquor, [illegible] previously been convicted [illegible] influence of intoxicating liquor [illegible] County, Illinois. [illegible] tion."

Plaintiff in error [illegible] if the evidence [illegible] of Levi Long [illegible] time [illegible]."

It is contended [illegible] one. The evidence [illegible] verdict [illegible] made [illegible] other [illegible] therefore [illegible] v. Loren, 290 Ill. [illegible]

is said: "Complaint is also made by appellant that the court submitted only two forms of verdict, but the record does not show that the appellant tendered or requested any other forms of verdict covering lesser degrees of crime embraced within the charge against appellant, and therefore no error was committed by the court as to this proposition under the authority of the cases heretofore cited."

It is next contended that under the section of the Motor Vehicle Act in question here, the "court" is given the power to fix the punishment where a defendant is found guilty and that the word "court" means that the "jury" should fix the punishment. Long thus contends that his punishment fixed by the Court in this case was erroneous. In People v. Davis, 349 Ill. App. 398; 110 N.E. (2d) 833 this court construed a similar provision in another paragraph of the Motor Vehicle Act and held that the word "court" meant the "judge". This decision is controlling here. We also believe that the trial court had authority to revoke defendant's driver's license under Par. 35J of the Motor Vehicle Act. (Ill. Rev. Stat. 1951, Ch. 95½ Par. 35J; People v. Kobylak, 383 Ill. 432; 50 N.E. (2d) 465.)

Plaintiff in error has questioned other rulings and procedure in the trial court. We have considered such alleged errors and find they are without merit. Only one deserves comment. Dr. Raymond Sheets was called as a witness by Long and testified on Direct Examination that the defendant suffered from a cardiac condition. On Cross Examination the State's Attorney was allowed to question the doctor as to whether his patient was addicted to alcoholism. This was improper and the State's Attorney should have known it. Moreover, the record

discloses other remarks by the State's Attorney that were unnecessary and, at least, in poor taste. The representative of the People, in his zeal to win, should never, even in the slightest degree, attempt by insinuation or otherwise to prejudice the rights of a defendant. (People v. Dean, 308 Ill. 74; 139 N.E. 37.)

Although the defendant denied his intoxication the evidence supports the verdict and there does not appear to be any reasonable doubt as to the defendant's guilt. While we believe the conduct of the State's Attorney was unwarranted and without justification, we are satisfied that in this case it does not amount to reversible error.

Judgment affirmed.

disclosed other remarks by the State's attorney that were unnecessary and, at least, in poor taste. The representative of the people, in his zeal to win, should never, even in the all-[illegible] fight, resort to intimidation or otherwise to prejudice the rights of a defendant. (People v. Dern, 304 Ill. 284; 136 N.E. 7.)

Although the [illegible] evidence supports the verdict [illegible] doubt as to the defendant's guilt. [illegible] of the State's Attorney [illegible] are satisfied that [illegible] error.

4163 A

Abstract

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

MAY TERM, A.D. 1954

General No. 9947

Agenda No. 11

12 I.A. 21 530

In the Matter of the Estate of Sarah Kanner, deceased.
# # #

Mandel Friedman, as Co-Executor,
Petitioner-Appellant,

vs.

Archie F. Friedman, Bernard Friedman, Jacob Rufus Friedman, Adolph Friedman, Yomen Bennie Friedman, Marguerite Betty Miller, Hannah Feir and Rose Mund,
Respondents-Appellees.

Appeal from Circuit Court of Sangamon County

Hibbs, J.

This is an appeal from the Circuit Court of Sangamon County fixing the fee of Mandel Friedman, one of the executors of the last will and testament of Sarah Kanner, Deceased. The cause was heard originally in the Probate Court of that county where a fee of $4,000 was allowed for Friedman and also for his co-executor Rose Mund. Objections were filed by some of the Kanner heirs and, at a hearing, the Probate Court sustained their objections and reduced the fee of each executor to $2000. Friedman alone appealed to the Circuit Court where the matter was heard de novo. That court set Friedman's fee

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

MAY TERM, A.D. 1954

General No. 9947

Agenda No. 11

In the Matter of the Estate
of Sarah Hamner, Deceased.

* * *

Mandel Friedman, as Co-Executor,
Petitioner-Appellee,

vs.

Myrtle E. Friedman, Herman
Friedman, Jacob Mutus
Friedman, Ralph Fried-
man, Joseph Harold Fried-
man, Marjorie Esther Fri-
ler, Samuel Fair and Ros-
lund,

Respondents-Appellees.

Hibbs, J.

This is an appeal from [illegible]

Fixing the fee of [illegible]

will and testa[illegible]

originally in the [illegible]

was allowed for Friedman [illegible]

Objections were filed by [illegible]

the Probate Court [illegible]

each executor in [illegible]

where the [illegible]

at $3500. Friedman contends that he is entitled to no less than $6000, and no more than $9000.

Appellees, heirs of Sarah Kanner, contend at the outset that the order of the Circuit Court is not a final order and hence not appealable. While it is true that the Kanner estate is open and that no final accounting has been made, it does not follow that no final determination of the executor's fees can be made at this time. It is apparent that the issue of fees in this case was controverted in both the Probate and Circuit Courts. The order of the Circuit Court, in the absence of this appeal, would have bound all parties concerned as to the matter of fees and was immune to collateral attack. It thus became a final order subject to review here. (Griswold v. Smith, 214 Ill. 323.)

The Probate Act provides that an executor shall be allowed reasonable compensation for his services, (Ill. Rev. Stat. 1951, ch. 3, par. 490) and Friedman contends that this court, on review, may exercise its independent judgment as to the reasonableness of the amount allowed him in the trial court. In this connection, he cites Gilbert v. Lloyd, 170 Ill. App. 436 and Colton v. Coffey, 187 Ill. App. 558. In the former case the Appellate Court for the First District, finding numerous errors in the trial proceedings, reversed a judgment for attorney fees entered after a trial by jury in the Municipal Court of Chicago; in the latter, the Appellate Court for the Second District reversed an order of the Circuit Court of Knox County fixing fees of an administrator and his attorney and set the fees itself in amounts not only different from those determined in the Circuit Court but also different from those fixed by the County

at $3500. Friedman contends that he is entitled to no less than $6000, and no more than $9000.

Appellees, heirs of Sarah Kramer, contend on the contest that the order of the Circuit Court is not a final order and hence not appealable. While it is true that Mr. [illegible] is dead and that no final accounting has been made, it does not follow that no final determination of the executor's fees can be made at this time. It is apparent that the issue of fees in this case was considered in both the probate and circuit courts. [illegible] of the probate court, in the absence of [illegible] concerned as to the matter of fees [illegible] attack. It thus has a [illegible] (Gratwold v. Smith, [illegible] Ill. [illegible])

The probate [illegible] reasonable compensation [illegible] on. 3, par. [illegible] may exercise [illegible] the amount allowed [illegible] cites Illman v. [illegible] Ill. App. 355. [illegible] district, find [illegible] a judgment for [illegible] Municipal Court of [illegible] the Second District [illegible] County Fixing [illegible] fees itself in [illegible] the Circuit Court [illegible]

Court in the first instance. In both cases the power of a reviewing court to exercise an independent judgment in the matter of such fees was announced. It is, however, a basic principle of appellate practice needing no citation that findings of a judge or jury should not be disturbed unless they are manifestly against the weight of the evidence. A corollary to this doctrine is that the compensation of an administrator and his attorney are matters peculiarly within the province of the probate judge, (People v. Ballans, 294 Ill. 551, 128 N. E. 542; Griswold v. Smith, supra; Elder v. Whittemore, 51 Ill. App. 662) and this is recognized in Colton v. Coffey, cited by appellant.

We do not believe the record in this case presents any unusual features which compel us to interfere with the judgment of the Circuit Court. It is true that the executors here were entrusted with the administration of an estate of over three hundred thousand dollars and that Friedman was called upon to reconstruct the accounts of an elderly lady who kept meager business records. It also appears that Friedman carried a greater burden in the administration which justified the allowance by the Circuit Court of a fee greater than that allowed Mrs. Mund by the Probate Court. But there is also evidence that administration of the estate has been unduly protracted and that certain of the Kanner heirs have not been satisfied with the manner in which it has been conducted. The Circuit Court of Sangamon County saw and heard the witnesses in this case and gave the parties a fair and complete trial de novo. We cannot say that it so misjudged the value of appellant's services that error was committed.

Judgment affirmed.

Court in the first instance. In both cases the power of a reviewing court to exercise an independent judgment in the matter of such fees was announced. It is, however, a basic principle of appellate procedure meeting no objection that findings of a jury or jury should not be disturbed unless they are [illegible] against the weight of the evidence. A corollary to this doctrine is [illegible] of an administrator and his attorney are [illegible] within the province of the probate [illegible]. [illegible] N. E. 542; [illegible] 662) and this is too much [illegible].

We do not believe [illegible] feature which [illegible] Court. It is [illegible] administration of [illegible] and that [illegible] elsewhere [illegible] Friedman [illegible] fied the allowance by [illegible] allowed [illegible] that administration of [illegible] that certain of [illegible] manner in which [illegible] County, may and [illegible] a fair and [illegible] the value of [illegible]

[illegible]

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Gen. No. 10719 Agenda No. 3.

2 I.A. 600

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1954

MAURICE E. ASHBY,

Appellant

vs.

CARL F. EINIG,

Appellee

Appeal from
City Court of
Aurora, Illinois

WOLFE,-- J.

Illinois State Route No. 31 passes over Lake Street in the City of Aurora, Illinois. This street is intersected by Prairie Street. Lake Street runs in a general north and south direction. Prairie Street runs in a general southwesterly and northeasterly direction. Lake Street is a preferential highway and marked with stop signs at the intersections of streets, (Prairie Street included,) as provided by the Illinois Revised Statutes.

On August 2, 1951 Maurice E. Ashby was the owner of and riding his motorcycle along Lake Street in a southerly direction. Carl F. Einig was the owner of a motor vehicle and driving the same on Prairie Street in a general northeasterly direction. Carl F. Einig drove his automobile into Lake Street,

and while in the act of making a left turn in the same, the motorcycle of Maurice E. Ashby collided with the motor vehicle of Carl F. Einig and Ashby was seriously injured.

Maurice E. Ashby filed a suit in the City Court of Aurora, Illinois, against Carl F. Einig, alleging that it was through the careless and negligent operation of his motor vehicle that he was injured, and that he himself was in the exercise of due care and caution for his own safety at the time of the collision. The defendant filed an answer in which he denied all acts of negligence on his part which in any way contributed to the injury of the plaintiff.

The case was submitted to a jury that found the issues in favor of the defendant. The plaintiff entered a motion for a new trial, which was overruled by the Court, and a judgment entered in favor of the defendant, and it is from this judgment that an appeal has been perfected to this Court.

It is first insisted that the verdict of the jury is contrary to the manifest weight of the evidence. In our view of this case, it is not necessary for this Court to pass upon this assignment of error, as we think the case will have to be reversed on other grounds, and a new trial granted.

Section 167 of Chapter 95½ Illinois Revised Statutes provides as follows: "The Department may in its discretion and when traffic conditions warrant such action give preference to traffic upon any of the State highways under its jurisdiction, upon which has been constructed a durable hard-surfaced road over traffic crossing or entering such highway by erecting

appropriate stop signs or stop lights and in such case vehicles entering upon or crossing such highway shall come to a full stop as near the right-of-way line of such highway as possible and regardless of direction shall give the right-of-way to vehicles upon such highway."

It is admitted that Lake Street is a part of Route 31 of Illinois Highway and is equipped with such highway stop signs. The defendant claims that he stopped his motor vehicle before entering Lake Street in compliance with this regulation, and that he was acquainted with the location of the intersection of the two streets in question; that he had observed the stop signs many times. On being asked whether he stopped at one of the stop signs, he answered: "I stopped behind the stop sign," and further answered: "Possibly one or two car length behind it, because there were cars ahead of me." The evidence shows that at the time of the accident or the collision in question, the defendant's view was obstructed as he approached Lake Street by bushes and small trees, by what is commonly called a blind corner. He further testified that he did not stop between that time and the time that he entered Lake Street, but did go at a very slow rate of speed. In the case of Ritter vs. Nieman, 329 Ill. App. 163, we were discussing the law relative to motorists observing stop signs before entering upon a preferential highway and there used this language: "What is the purpose of a stop sign? Certainly, it does not signify that a motorist should stop, and then blindly proceed through a protected intersection without determining that he can do so with reasonable safety. The operator of a motor vehicle, when he stops

at a preferred highway, should ascertain if he can proceed safely across such highway. If he can not, he should not enter it. Merely stopping some place near a stop sign does not necessarily discharge one's duty. There is no virtue in stopping at a place when one can not see. A stop sign is a challenge to motorists to stop at a point where, by the use of one's faculties, one can definitely ascertain if he can safely proceed into the protected thoroughfare. Using the language of the Greenwald case, supra, we say that the law will not tolerate the absurdity of a motorist saying that he stopped at a through street but did not see another vehicle with which he collided as he proceeded into the intersection, when it is so obvious that if he had stopped and looked he would have seen the vehicle." What we said in that case is very applicable to the facts in the present case. It is our conclusion that the defendant did not comply with the law relative to observing the stop signs.

Complaint is made in regard to instructions given on behalf of the defendant by the Court. The first paragraph of Instruction No. 11 is as follows: "The Court instructs the jury that the fact that the defendant's automobile came into collision with the plaintiff's motorcycle does not render the defendant liable to respond in damages." This is followed by another paragraph that directs a verdict. The second paragraph does not relate to the first paragraph and it was error to give this instruction. Instruction No. 13, in telling the jury what was necessary for the plaintiff to prove, the first paragraph is as follows: "That at and immediately prior to the accident in question, the plaintiff was not guilty of any negligence

which contributed to cause said accident." It omits one very necessary element that the negligence, if any, must be the proximate cause of the accident.

Instruction No. 18 in part is as follows: "The instructions given to the jury by the Court must be accepted by them as the law governing the case. The jury will not be justified in finding a verdict contrary to the law laid down in the instructions. While the jury are the judges of the facts in the case, it is the duty of the jury to determine such facts from the law as laid down in the instructions of the Court." The appellee admits that this instruction is erroneous, but he claims that it was not prejudicial. With this, we cannot agree, as the instruction states: "It is the duty of the jury to determine such facts from the law as laid down in the instructions of the Court," when it should have been that they must determine the facts from the evidence in the case, and be governed by the law as laid down in the instructions of the Court.

Defendant's Instructions No. 10, 11, 12, 13, 14, 15, 16 and 21 direct a verdict and end with, that the jury should find the defendant not guilty, or the plaintiff cannot recover. In the case of Baker vs. Harold Thompson, from the second district, 337 Ill. App. 327, seven of the defendant's instructions emphasized the duty of the plaintiff to exercise due care and be free from contributory negligence. In discussing the merits of the instructions, we use this language: "There could be only one purpose in having the trial court read to the jury seven different times a pronouncement that 'the plaintiff must be

free of contributory negligence,' and that was to unduly prejudice the jury against the plaintiff. The jury could very easily have concluded that the trial judge was making another argument in behalf of the defendant. It is not unnatural for a jury to have great respect for the wisdom of the trial court. Likewise it is not unreasonable for them to adopt the views that the court apparently entertains. When the court tells them repeatedly that 'the plaintiff cannot recover' or that 'they must find the defendant not guilty,' the jury may believe that the court is of the opinion that the verdict should be for the defendant. No one coming into our courts for redress of wrongs done them should be required to bear the onus of this disadvantage." It was error to give so many instructions directing a verdict.

Defendant's Instruction No. 21 should not have been given, as it is repetition of a part of Instruction No. 10.

In addition to the regular verdict of the jury, they made a special finding as follows: "The jury recommends a four-way stop at this intersection. Also some action about the visibility on said corner. Lake and Prairie Street." After the return of the verdict, the plaintiff asked leave to file six affidavits. Five of the jurors and one husband of one of the jurors, that five of the jurors during the trial had gone out to the scene of the accident, viewed the same, and made tests in regard to seeing cars approaching on Lake Street. The Court refused to allow these affidavits to be filed, or to consider them. It has repeatedly been held that affidavits of jurors to impeach their verdict, is not allowed,

and we think the Court properly held that the jurors should not be allowed to impeach their verdict. It was certainly highly improper for the jurors to go out and view these premises, especially a considerable time after the accident happened, when there was no evidence that the corner and the surroundings were in the same condition as they were at the time of the accident.

Our attention has not been called to any case where it would not be proper for another person, not a juror to tell what he saw the jurors do that was improper in regard to the case, and we think the affidavit of Donald W. Grote who was not a juror, should have been considered. For the reasons before stated, the judgment of the trial court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

Mr. Justice Anderson took no part in the consideration or determination of this case.

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Gen. No. 10725 Agenda No. 6

12 I.A. 601

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1954

RAY ASKEY,

Plaintiff-Appellee

vs.

ARNOLD KNEUBUEHL and ALVIN ZIPSIE,

Defendants-Appellants

Appeal from the Circuit Court of Stephenson County, Illinois.

WOLFE,-- J.

The plaintiff, Ray Askey, seeks to recover in a suit in the Circuit Court of Stephenson County, for damages to his Ford truck caused in an intersection accident, involving another truck owned by the defendant, Arnold Kneubuehl and Alvin Zipsie, the driver of said truck for Kneubuehl.

It is charged in the complaint that the plaintiff's truck was being driven by a man by the name of Jensen and at the time of the accident in question Jensen was using ordinary care for the safety of himself and the truck he was driving. The defendants filed an answer and denied the allegation of negligence on their part. When the accident occurred, plaintiff's truck was being driven in an easterly direction, and

the defendants' truck in a northerly direction, and the trucks collided at the intersection. At the southwest corner of the intersection there is a farm residence with outbuildings and trees so that the view of a driver going north or one going east, would be partially obstructed. The case was tried before a jury that found the issues in favor of the plaintiff and assessed his damages at $1500.

It is stipulated that if the plaintiff was entitled to recover, his damages should be $1500. The Court entered judgment on the verdict. The defendant filed a motion for judgment notwithstanding the verdict. This motion was overruled, and the defendant has perfected an appeal to this Court to reverse this judgment.

The defendants did not file a motion for a new trial. They do not claim that there was any error in the admission of evidence, or instructions given by the Court, so it is purely one of fact as to whether there is any evidence to sustain the verdict. The only witnesses called were the drivers of the two trucks. At the time of the accident in question there were no stop signs, so neither road was a preferential highway. The plaintiff's driver testified that he entered the intersection first and thought he had time to cross. The defendant, Zipsie, testified that he saw the plaintiff's truck five or six hundred feet away, so he knew that the plaintiff's truck was about to pass through the intersection. In a case of this kind every presumption must be decided in favor of the plaintiff and if there is any evidence that sustains this

judgment, it must be affirmed. What was said in the case of Blumb vs. Getz, 366 Ill. 273 is applicable to the facts in this case. It is there stated: "If the automobile was far enough way at the time to have justified a person in the exercis of ordinary care to have acted as the plaintiff did, it woul not necessarily indicate such a lack of care on the part ofthe plaintiff as would amount, in law, to negligence. The cuetion of contributory negligence is one which is pre-eminently a fact for the consideration of a jury. It cannot be defned in exact terms and unless it can be said that the actionof a person is clearly and palpably negligent, it is not whin the province of the court to substitute its judgment or that of a jury which is provided for the purpose of deding this as well as the other questions in the case."

Under the evidence in this case, we can not say as a matt of law that the plaintiff's driver was guilty of contribory negligence that was the proximate cause of the plaiiff's injuries. Therefore, the judgment of the trial courshould be and is affirmed.

Judgment affirmed.

Mr. Justice Anderson took no part in the consideration or determination of this case.